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In the Supreme Court of the United States

OCTOBER TERM, 1960

FRANK R. COPPOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	3
Summary of argument	30
Argument	40
I. Petitioner's voluntary confessions of federal crimes to federal officers while in the custody of city police officers were properly admitted, although his detention was in violation of local law, because the detention was not the result of connivance or collaboration with the federal officers of the sort involved in *Anderson* v. *United States*, 318 U.S. 350	41
Introductory	41
A. The confessions in the *Anderson* case	45
B. The confessions at bar	50
II. The fact that at the time when petitioner voluntarily confessed he was being detained by local officers in violation of local law did not in itself make his confessions of federal offenses to federal officers inadmissible at his trials for those federal offenses	70
Conclusion	84

CITATIONS

Cases:	
Abbate v. *United States*, 359 U.S. 187	73
Abel v. *United States*, 362 U.S. 217	69
Anderson v. *United States*, 318 U.S. 350	2, 6, 7, 28, 30, 31, 32, 33, 40, 41, 45–50, 51, 68, 70, 71, 72
Bass v. *State*, 196 Misc. 17, 92 N.Y.S. 2d 42	43
Brown v. *Allen*, 344 U.S. 443	38, 78
Brown v. *United States*, 228 F. 2d 286, certiorari denied, 351 U.S. 986	68

586155—61——1

Cases—Continued

	Page
Burdeau v. *McDowell*, 256 U.S. 465	38, 75, 76
Burns v. *Wilson*, 346 U.S. 137	78
Byars v. *United States*, 273 U.S. 383	79
Carpenter v. *United States*, 264 F. 2d 565	68–69
Cicenia v. *Lagay*, 357 U.S. 504	78
Crooker v. *California*, 357 U.S. 433	78
Elkins v. *United States*, 364 U.S. 206	36, 38, 55, 67, 76–77, 78, 79
Feldman v. *United States*, 322 U.S. 487	76
Fikes v. *Alabama*, 352 U.S. 191	78
Gallegos v. *Nebraska*, 342 U.S. 55	78
Horne v. *United States*, 246 F. 2d 83, certiorari denied, 355 U.S. 878	68
Lisenba v. *California*, 314 U.S. 219	78
Lyons v. *Oklahoma*, 322 U.S. 596	78
McGuire v. *United States*, 273 U.S. 95	38, 75
McNabb v. *United States*, 318 U.S. 332	2, 6, 7, 37, 38, 40, 41, 70, 71, 72, 73, 78
Mallory v. *United States*, 354 U.S. 449	73
Monroe v. *Pape*, No. 39, decided February 20, 1961	77–78
Olmstead v. *United States*, 277 U.S. 438	76
Papworth v. *United States*, 256 F. 2d 125, certiorari denied, 358 U.S. 854	68
People v. *Alex*, 265 N.Y. 192, 192 N.E. 289	43
People v. *Calebressi*, 233 App. Div. 79, 251 N.Y.S. 603	43
People v. *Cohen*, 243 App. Div. 245, 276 N.Y.S. 851	43
People v. *Doran*, 246 N.Y. 409, 159 N.E. 379	43
People v. *Elmore*, 277 N.Y. 397, 14 N.E. 2d 451	43
People v. *Kelly*, 264 App. Div. 14, 35 N.Y.S. 2d 55	43
People v. *Lovello*, 1 N.Y. 2d 436, 136 N.E. 2d 483	43
People v. *Mummiani*, 258 N.Y. 394, 180 N.E. 94	43
People v. *Redmond*, 265 App. Div. 307, 38 N.Y.S. 2d 727	43
People v. *Snyder*, 297 N.Y. 81, 74 N.E. 2d 657	43
People v. *Spano*, 4 N.Y. 2d 256, 150 N.E. 2d 226	43
People v. *Trinchillo*, 2 A.D. 2d 146, 153 N.Y.S. 2d 685	43
People v. *Trybus*, 219 N.Y. 18, 113 N.E. 538	43
Rea v. *United States*, 350 U.S. 214	72, 78
Stein v. *New York*, 346 U.S. 156	78
Stroble v. *California*, 343 U.S. 181	78
Tillman v. *United States*, 268 F. 2d 422	69

Cases—Continued	Page
United States v. *Mitchell*, 322 U.S. 65	72
Upshaw v. *United States*, 335 U.S. 410	72
Weeks v. *United States*, 232 U.S. 383	79
White v. *United States*, 200 F. 2d 509, certiorari denied, 345 U.S. 999	68
Wilson v. *Schnettler*, No. 182, this Term, decided February 27, 1961	72
Wolf v. *Colorado*, 338 U.S. 25	77, 79
Federal constitutional provision, statute and rule:	
Fourteenth Amendment	38, 73, 77
18 U.S.C. 2113(a)	3
Rule 5(a), F.R. Cr. P.	37, 42, 68, 71, 72, 73, 79
State statutes:	
Ariz. Rev. Stats. 1956, §§ 13–1417, 13–1418, 13–1419	80
Ark. Stats. 1947, § 43–601	81
Cal. Penal Code, § 825	80
Del. Code 1953, Tit. 11:	
§ 1902	82
§ 1911	80
Fla. Stats. 1941, §§ 901.06, 901.23	80
Ida. Code 1947, §§ 19–515, 19–614, 19–615	80
Ill. Smith-Hurd Ann. Stats., c. 38, § 660	80
Iowa Code 1946, §§ 755.14, 758.1	80
La. Rev. Stats. 1950, § 15:79	80
Mich. Stats. Ann., §§ 28.872, 28.873, 28.885	80
Miss. Code 1942, § 2473	80
Mo. Rev. Stats. 1949, § 544.170	81
Mont. Rev. Codes 1947, § 94–5912	80
Nev. Rev. Stats., §§ 171.290, 171.300	80
N.H. Rev. Stats. 1955:	
§ 594:2	82
§§ 594:19, 594:20	81
§ 594:23	80
N.J. Stats. Ann. (Perm. Ed.), § 2A:18–10	81
N.Y. Code Crim. Proc.:	
§ 165	42
§ 177	13
N.Y. Penal Law:	
§ 2	13
§§ 2124–2129	13
§ 2183	13

State statutes—Continued

	Page
N.D. Century Code, §§ 29–06–23, 29–06–25	80
Ohio Rev. Code 1953, §§ 2935.05, 2935.06	80
Okla. Stats. Ann., Tit. 22, § 181	80
R.I. Gen. Laws 1956:	
§ 12–7–1	82
§ 12–7–13	80
S.D. Code 1939, §§ 34.1608, 34.1610	80
Tex. Code Crim. Proc., Art. 217	81
Utah Ann. Code 1953, §§ 77–13–15, 77–13–17	80
Vt. Stats. 1958, Tit. 13, § 5507	81

Miscellaneous:

Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, reprinting the proposed Uniform Arrest Act, § 2	82

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OPINIONS BELOW

The writ in this case covers two judgments, petitioner having been convicted at separate trials of two robberies (Court of Appeals Docket No. 25177, involving robbery of the Manufacturers and Traders Trust Company; Court of Appeals Docket No. 25257, involving robbery of the Liberty Bank of Buffalo). The majority and dissenting opinions of the court of appeals, sitting *en banc*, in the first of these cases (R. 284–307)[1] are reported at 281 F. 2d 340. The majority and dissenting opinions of the *en banc* court

[1] "R." refers to the printed record in this Court, containing excerpts from the proceedings in both cases. "No. 25177, Tr." refers to the reporter's transcript in case No. 25177; "No. 25257, Tr.", to the reporter's transcript in case No. 25257.

in the second case (R. 319–320) are reported at 281 F. 2d 360.[2]

JURISDICTION

The judgments of the court of appeals were entered on May 20, 1960 (R. 308, 322). The petition for a writ of certiorari was filed on June 17, 1960, and was granted on October 10, 1960 (R. 323; 364 U.S. 813). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner voluntarily gave federal officers a confession of federal offenses while they were questioning him with the permission of city police officers who were holding him in apparent violation of a state statute requiring the arraignment of arrested persons without delay. The questions presented are:

1. Whether the confessions were inadmissible at petitioner's federal trials under the principle of *Anderson* v. *United States*, 318 U.S. 350—in which the exclusionary rule of the *McNabb* case, 318 U.S. 332, was applied to confessions made to federal officers by persons in illegal state custody, where the evidence established that the illegal custody was the product of a "working agreement" between, and collaboration by, the federal and state officers.

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[2] The *en banc* court, in each case, overturned an earlier decision of a three-judge panel (which had divided two to one), vacated the panel's judgment, and withdrew its opinion (R. 307, 321). The original majority and dissenting opinions in the Manufacturers and Traders Trust Company case appear at R. 267–280. The original majority and dissenting opinions in the Liberty Bank case appear at R. 310–311, 318.

2. Whether the confessions were inadmissible solely because petitioner was in illegal local custody at the time, irrespective of any "working agreement" or collaboration on the part of the federal and city officers of the sort involved in the *Anderson* case.[3]

STATEMENT

On February 4, 1957, two indictments (R. 1–2, 179–182) were returned in the United States District Court for the Western District of New York charging petitioner and others with the robbery of two federally-insured Buffalo banks, in violation of 18 U.S.C. 2113(a). One indictment (R. 1–2) charged petitioner and Dario D'Antuono with robbing a branch bank of the Manufacturers and Traders Trust Company. The other (R. 179–182) charged D'Antuono, Joseph Simmons, Carmelo Giambra and James Millio with robbing a branch of the Liberty Bank of Buffalo, and charged petitioner with having aided, abetted and procured the commission of that offense. Following separate jury trials (R. 3–175, 182–265), presided over by two different judges, petitioner was found guilty under both indictments[4] and was sen-

[3] While the second of these questions was not raised by the petition for certiorari, it was involved in one of the alternative bases of the dissent in the court of appeals (R. 301–302) and is raised and argued by petitioner in his brief on the merits (Br. 2, 26–33).

[4] D'Antuono pleaded guilty to the Liberty Bank indictment (No. 25257, Tr. 413) and testified for the government at the trial of that case (No. 25257, Tr. 322–413). He also testified for the government at the M. & T. trial (No. 25177, Tr. 300–338), acknowledging in his testimony his own guilt, though it appears he had not formally changed his plea of not guilty

tenced to 20 years' imprisonment on each, the terms to run consecutively (R. 177–178, 266–267).

The evidence adduced against petitioner at the respective trials may be summarized as follows:

The M. & T. Bank case: On February 15, 1956, two masked men held up and robbed the Clinton-Bailey Branch of the Manufacturers and Traders Trust Company (the "M. & T. Bank") (R. 4–5). The Federal Bureau of Investigation had the robbery under investigation from the time of its occurrence (No. 25177, Tr. 55–56). Petitioner was a prime suspect as early as February 20, 1956 (No. 25177, Tr. 149–168, 213; R. 5–6). On November 5, 1956, petitioner told William Buyers, a cousin by marriage, that petitioner and a "partner" (whom he subsequently identified as D'Antuono) had "pulled the M. & T. bank job", and he proposed to Buyers that the latter be his "finger" man in future robberies which he planned to commit (R. 7–9). In five subsequent conversations between then and January 5, 1957, petitioner related to Buyers further details of the M. & T. robbery (R. 9–12). Unknown

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to guilty as of the time of testifying (No. 25177, Tr. 363). Giambra also pleaded guilty to the Liberty Bank indictment (No. 25257, Tr. 684). Simmons and Millio were tried jointly with petitioner in the Liberty Bank case, and were also convicted (R. 256, 265). Their convictions (in which the issues now before this Court were not involved) were affirmed by the three-judge panel which originally reversed petitioner's convictions (R. 311–317, 318–319), and were not involved in the subsequent *en banc* proceedings.

to petitioner, Buyers was making regular reports of these matters to the F.B.I. (R. 12, 140–143).[5]

D'Antuono, testifying as a witness for the government, gave a detailed account of his and petitioner's perpetration of the robbery (No. 25177, Tr. 303–337).

Robert Eddy, an F.B.I. agent, following a hearing out of the presence of the jury as to its admissibility (R. 14–122; see *infra*, pp. 7–28), was then permitted to testify to the making by petitioner, to him and another F.B.I. agent, Omar Jenson, while petitioner was in the custody of the Buffalo city police, of a detailed confession of his part in the robbery (R. 124–133).

The Liberty Bank case: On October 2, 1956, three men held up and robbed the Linwood Branch of the Liberty Bank of Buffalo (No. 25257, Tr. 9–47, 80–86, 172–177, 267–270). Buyers testified that petitioner, in his conversation with him of November 5, 1956 (see *supra*), acknowledged having instigated the commission of this crime by associates as part of a plan to throw the F.B.I., which suspected him of being implicated in the M. & T. offense, off the trail (R. 183; No. 25257, Tr. 548–550).

D'Antuono, again testifying for the government, gave a detailed account of the Liberty Bank robbery (No. 25257, Tr. 324–341). He testified that the offense

[5] The F.B.I. was in "daily contact" with Buyers from November 5, 1956, to January 10, 1957 (the day on which petitioner was arrested by the Buffalo police, see *infra*) (R. 142).

was instigated by petitioner and executed by himself, Simmons, Giambra, and Millio, the last-mentioned of whom remained outside the bank at the wheel of the getaway car (No. 25257, Tr. 324–337, 383–386).

Agent Eddy—again following a hearing out of the presence of the jury as to its admissibility (R. 187–238; *infra*, pp. 7–28)—then testified to a detailed confession by petitioner of his role in the Liberty Bank robbery, made to him and agent Jenson (as in the case of his M. & T. confession, and on the same occasion) while he was in the custody of the Buffalo police (R. 239–244).

On appeal to the Court of Appeals for the Second Circuit, a three-judge panel of that court (one judge dissenting)[6] reversed both convictions on the ground that petitioner's confessions had been improperly received in evidence under the rule of *Anderson* v. *United States*, 318 U.S. 350, in which this Court applied the rule and rationale of *McNabb* v. *United States*, 318 U.S. 332, to the factual situation there involved (R. 267–281, 309–311, 318–319). On motion of the government, a rehearing *en banc* was ordered (R. 281–283), and, on May 20, 1960, the *en banc* court, dividing three to two,[7] sustained the convictions (R. 284–308, 319–322).

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[6] The majority consisted of Judges Waterman and Washington (the latter, a regular member of the Court of Appeals for the District of Columbia Circuit, sitting by designation). Judge Moore dissented.

[7] Judge Moore wrote the majority opinion, in which Chief Judge Lumbard and Judge Friendly concurred. Judges Waterman and Clark dissented.

The confessions involved—an oral and a written confession in the M. & T. case (R. 124–133) and an oral confession in the Liberty Bank case (R. 239–244)—were made in the course of a single interview. Both cases, accordingly, present the same issues. The relevant facts were in each case, as we have noted, established at a hearing out of the presence of the jury (R. 14–122, 187–238), and they were and are essentially undisputed.* With one principal

*The hearing in each case had as its purpose the taking of evidence on the question (no longer involved) of the voluntary or involuntary character of the confession as well as on the issue (now before the Court) of whether the confession was excludable under the rule of the *McNabb* case as applied in *Anderson* v. *United States*, 318 U.S. 350. (For purposes of expedition, and at petitioner's counsel's suggestion, the evidence on both issues was adduced in each case at a single hearing (see R. 13, 22, 116–122, 186, 196, 223, 235–238).) Unlike the evidence on the *McNabb-Anderson* issue, the evidence on the issue of voluntariness was sharply disputed. For example, petitioner testified at the M. & T. hearing that his confession—made to F.B.I. agents Eddy and Jenson on the evening of January 10, 1957—was made at a time when he was suffering from hunger as a result of having been deprived of food (except for a sandwich which he found inedible) by the Buffalo police since his arrest at about 9:30 that morning (R. 51, 53–54, 56, 61–62, 67–68); that he was denied permission by the agents (as well as others to whom he spoke at police headquarters during the day) to call a lawyer (R. 52–53, 60, 66); and that the agents prevailed on him to confess by telling him that his wife and mother were in custody and that, if he would confess, they would use their influence to see that the case against them was dropped (R. 57, 58–60). (Petitioner repeated at the Liberty Bank hearing his testimony about being deprived of food (R. 235), but none of the other details.) The agents, on the other hand, testified that petitioner made no complaints to them regarding food, or complaints of any kind (R. 27, 31, 43, 44, 46, 206); that his only requests—for water and cigarettes—were complied with (R. 34, 44, 204;

exception, to be noted (see *infra*, pp. 9–15, including fn. 9, p. 9), the evidence adduced at the two hearings went over essentially the same ground and established substantially the same facts. In some instances, on the other hand, details of significance were developed at one hearing which were not developed at the other. There is no necessity, however, we think, for setting forth separately—in statements which would necessarily largely duplicate each other—the facts as adduced at the respective hearings. Instead, we present a composite statement of the facts as developed at both hearings, keying our record references (in general) to both, and noting as we go along which of the details were developed at one hearing only.

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see also R. 58, 59, 61, 68, 72, 202); that he did not appear tired, nervous, or afraid (R. 31, 43, 45); that they advised him of his rights, including the right to consult an attorney before speaking to them and to refrain from speaking to them at all (R. 22, 27, 31, 35, 36, 43, 201); that they did not tell him that his wife or mother was in custody, and made no promises to him of any kind (R. 23, 27, 40, 41, 45, 48, 49, 207); and that he talked very freely, volunteering matters in some instances (R. 33, 44, 206). Though petitioner repeated none of his testimony in either case in the presence of the jury (in neither case did he take the witness stand at the trial proper, see R. 170, 262–263), the judge in each case, in his instructions to the jury, left it to them to decide, as a factual matter, whether the confession was voluntary or involuntary, and to accept or reject it accordingly (R. 169–170, 172–173, 259, 262).

1. *Petitioner's arrest and the circumstances leading to it*[9]

On January 7, 1957, John Roche, special agent in charge of the Buffalo office of the F.B.I., asked John Golombeck, Chief of Detectives of the Buffalo Police Department, whether the Buffalo police had any record of the robbery, on the night of January 4, 1957, of a Buffalo butcher whose first name was Paul and whose last name was unknown; Roche explained to Golombeck that the F.B.I. had received information that a person of this description had been robbed on that night by petitioner and two other men, named D'Antuono and Simmons.[10] Golombeck told Roche

[9] The facts set forth under this caption (aside from the bare fact of petitioner's arrest by the Buffalo police on the morning of January 10, 1957, at a time when petitioner was committing no crime (see R. 208, 217)) were adduced at the M. & T. hearing only. For the reasons why they were not adduced in the Liberty Bank case (notwithstanding government counsel's attempts to do so), see *infra*, pp. 15–17.

[10] While the record does not clearly establish the fact, it is inferable that this information (as well as that referred to in the following paragraph) was received by the F.B.I. from its informant Buyers (see *supra*, pp. 4–5). As appears from Buyers' testimony before the juries in these cases, petitioner, commencing with his conversation with Buyers of November 5, 1956 (in which he disclosed his involvement in both the M. & T. and the Liberty Bank robberies), had been periodically confiding to Buyers—during the remainder of November,

that the police did have a record of such a robbery, and that the victim's name was Paul Redlinski. Roche then furnished Golombeck with photographs of petitioner and his two associates, and, on the following day, Redlinski identified petitioner, from his photograph, as one of the persons who held him up. (R. 93–94, 100, 106–107.)

On January 9, 1957, Roche informed Golombeck that the F.B.I. had received information that petitioner, D'Antuono, and Simmons were contemplating the commission of another robbery at 10 o'clock on the following morning, and that it was possible that the place which they were planning to rob was the El Chico Tavern on Clinton Street (R. 107). Such a crime, if committed, would have been within the exclusive jurisdiction of the Buffalo Police Department and the authorities of the State of New York; the F.B.I. would have had no official concern with the offense (R. 82).

Roche also gave this information to a New York State official, John Dwyer, the District Attorney of Erie County (R. 108). Roche testified as follows

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throughout December, and during the early part of January—various details not only of those robberies but also of future criminal actions which he and his associates were contemplating (R. 7–12, 183–184; No. 25177, Tr. 242–269; No. 25257, Tr. 544–558). One of the conversations related by Buyers occurred on January 5, 1957—the day following the robbery of the butcher referred to in the text—when, according to Buyers, petitioner had "quite a bit of money in front of him" which he was "counting and sorting" (No. 25177, Tr. 263). As has been noted (fn. 5, *supra*, p. 5), the F.B.I. was in "daily contact" with Buyers between November 5, 1956, and January 10, 1957 (R. 142).

concerning his reason for giving Dwyer this information (*ibid.*):

> I informed Mr. Dwyer that in view of the information we had received of a contemplated hold-up in the City of Buffalo the following morning that we felt obligated to furnish him with this information so that he might take whatever action he desired to protect the citizens of Buffalo and to prevent, if possible, another hold-up.

Roche further told Dwyer that the F.B.I. had been investigating petitioner in connection with the M. & T. Bank robbery, the Liberty Bank robbery,[11] and the "contemplated" robbery of a third Buffalo bank, the "Marine Trust at Seneca and Emslie"[12] (R. 108).

On the following morning, January 10, 1957, officers of the Buffalo Police Department were detailed by Golombeck to a number of taverns in the area in which it was thought the planned holdup might take place (R. 93, 94). Golombeck, together with Lieutenant Harry Klenk and another Buffalo police officer, stationed themselves in an automobile in the vicinity of Clinton and Babcock Streets, near which the El Chico Tavern was located (R. 75–76, 93, 108). At about 9:30 or 9:45 the three officers saw a car in which petitioner, D'Antuono, and Simmons were

[11] The M. & T. and Liberty Bank robberies—constituting as they did state as well as federal offenses—were matters of official concern to Dwyer as well as to the federal authorities (see *infra*, pp. 62–63).

[12] Petitioner had told Buyers that he was planning to rob a bank located at Seneca and Emslie Streets (R. 9–10; No. 25177, Tr. 260).

riding (R. 50, 75–76, 93, 95). With drawn weapons the officers overtook petitioner and his companions, ordered them to pull over, and (either immediately or within a short while thereafter[13]) took them into custody (R. 50, 76–77, 80–81, 95, 108, 113, 208, 217).

The apprehended individuals were committing no crime at the time (R. 76, 95, 208) and the officers had no warrant for their arrest (R. 80). The officers asked them "[w]hat they were going to do" and "what was in the automobile that they were riding in" (R. 84). It does not appear what answers, if any, were given to these questions. As a result either of a search of the car by the officers or disclosure by its occupants (it does not appear which), the officers found beneath the driver's seat a number of articles among which was "a paper bag with a couple of silk stockings in it" (R. 91).[14] Klenk, asked at the hearing if he informed petitioner that he was under arrest, said: "Well, we didn't use the exact word 'arrest.' We said, 'We are going to take you down to headquarters for questioning'" (R. 77). At another point in his testimony Klenk stated that petitioner

[13] It is not clear whether the actual apprehension of the men (as distinguished from stopping them for purposes of inquiry) occurred immediately following the stopping of the car or subsequent to the officers' interrogation of the men and the discovery of certain suspicious articles under the driver's seat (see *infra*).

[14] Masks made of women's stockings were worn by both the robbers who held up the M. & T. Bank (R. 125) and by two of the perpetrators of the Liberty Bank holdup (No. 25257, Tr. 270, 378, 383–384). Whether this was known by the officers who stopped petitioner's and his companions' car does not, however, appear.

and his companions "were taken downtown for further investigation * * * as to what they had with them in their possession" (R. 91). Although Klenk, in reply to a leading question by petitioner's counsel, testified that the officers "arrested [petitioner] on suspicion" (R. 80–81, 208) it appears from the testimony of Golombeck (who was Klenk's superior, see R. 90) that, at least as to petitioner, Golombeck was effecting an arrest without warrant—as authorized by New York law—on the basis of probable cause for the belief that the person arrested had committed a felony, namely, the Redlinski robbery (see *supra*). Thus, Golombeck testified that he knew at the time of petitioner's apprehension that petitioner had been identified by Redlinski, through a photograph, as one of the persons who robbed him (R. 97, 100); and upon being asked by government counsel whether "as a police officer [he was] familiar with the fact that [he could] make an arrest without a warrant where a felony has been committed," replied, "That's right" (R. 100).[15]

The decision to apprehend the three men was solely that of the local police officers (R. 82, 101). No F.B.I. agent was present, and no agent had requested such action (R. 101, 116).

[15] Under New York law, a peace officer may arrest without a warrant when (among other occasions) a felony has been committed (or the officer has reasonable cause so to believe) and the officer has reasonable cause to believe that the person arrested committed it. Code of Criminal Procedure, § 177. (Robbery is, of course, a felony in New York. Penal Law, §§ 2, 2124–2129, 2183.)

At about 11 a.m. or shortly thereafter, Golombeck telephoned F.B.I. agent Roche and told him that he and other officers had arrested petitioner, D'Antuono, and Simmons in the vicinity of the El Chico, and that they were then on their way to police headquarters with them (R. 108, 113).[16] Roche, asked at the hearing if he was "expecting a call from Golombeck at the time [he] got it," said that he was "not necessarily" expecting such a call, but that he "thought" Golombeck would call "if anything had developed" (R. 115–116). Golombeck testified that he made this call "[t]o let [Roche] know I apprehended the three," as "a courtesy extended to [Roche] for supplying me with the information" (R. 102).

On cross-examination by counsel for petitioner, Roche acknowledged that the F.B.I. and the local authorities had cooperated closely with each other in their attempts to solve the M. & T. robbery (R. 112–113).[17] "[W]e worked very closely with the detective bureau of the Buffalo police department," Roche testified, "and we worked the case mutually" (R. 112). "If we had any information we wanted to work on mutually," he further explained, "we would work with the detectives and we would assign a detective and an agent together to work it out" (R. 113). Golombeck, similarly, testified that "courtesy

[16] Golombeck's recollection was that he called Roche some time after the officers' arrival at the police station. However, he could not recall the exact time of the call. (R. 95, 96.)

[17] Presumably the same was true with respect to the Liberty Bank robbery. The subject was not inquired about at the Liberty Bank hearing, however, and there is no testimony on the point.

and cooperation" marked the relations between the Buffalo police and the F.B.I.; that the police "work[ed] hand in hand with [the F.B.I.] and the Sheriff's office" (R. 102). The F.B.I., however, at no time either gave "directions" to, or made requests of, the Buffalo Police Department in connection with their respective investigations of the case (R. 113).

2. *Petitioner's counsel's disavowal in the Liberty Bank case of any claim that petitioner was arrested "at the behest of the F.B.I."*

As we have noted (see fn. 9, *supra*, p. 9), except for the bare fact of petitioner's arrest by the Buffalo police on the morning of January 10 at a time when petitioner was committing no crime (see R. 208, 217), the facts thus far related were adduced in the M. & T. case only. Attempts by government counsel in the Liberty Bank case to establish the circumstances which led to petitioner's arrest, and to show that "the arrest was the independent act of the Buffalo Police Department, and they were not acting for the F.B.I." (R. 218), were blocked by repeated objections by petitioner's counsel that any such evidence would be irrelevant, for the reason that counsel did not claim that the arrest was made "at the behest of the F.B.I." (R. 218, 230), and by rulings by the court sustaining counsel's objections. The circumstances of these objections and rulings were as follows:

a. Government counsel, during the examination of Lieutenant Klenk, asked the witness whether, at the time of petitioner's arrest, he had "certain information which caused [him] to make the arrest" (R. 217).

Counsel for petitioner objected on the ground that any information the witness might have had would be irrelevant, and the objection was sustained (*ibid.*). The following then occurred (R. 218):

> MR. BROUGHTON [government counsel]: Just a moment, your Honor. I want to be heard on that matter before the ruling. First of all the contention of Mr. Mahoney is, as I understand it, that the Buffalo Police arrested Frank Coppola at the behest of the Federal Bureau of Investigation.
>
> MR. MAHONEY [counsel for petitioner]: I never asserted that.
>
> MR. BROUGHTON: I am entitled to show that the arrest made of the defendant Coppola was made with respect to [information] concerning a state charge and show the arrest was the indendent act of the Buffalo Police Department, and they were not acting for the F.B.I.
>
> THE COURT: I don't see you need that. * * *

Following further colloquy, government counsel again attempted to establish through the witness (Klenk) that the arrest was occasioned by information which he had received, and that the information "dealt with the commission of an offense against the Penal Laws of the State of New York" (R. 218). Petitioner's counsel again objected, and the objection was again sustained (*ibid.*).

b. Later in the hearing, following testimony by agent Roche that in January 1957 he had a conversation "with some local authorities in the City of Buffalo with respect to the defendant Coppola and

others," government counsel asked the witness whether the conversation was not "with respect to a matter not within [his] jurisdiction" (R. 229). Counsel for petitioner objected on the ground, among others, that the answer would be "hearsay" (*ibid.*). The following then occurred (R. 230):

> MR. BROUGHTON: He has raised the issue of whether or not the Buffalo Police Department arrested this man at the behest of the F.B.I. Now when the Government seeks to introduce in evidence from the very witness that would make such arrangement, if it existed, we are met with an objection it is hearsay.
>
> MR. MAHONEY: I want to meet that head on, because I think you certainly have within your grasp the fact I do not claim that the Buffalo Police made an arrest at the behest of the F.B.I.
>
> THE COURT: I have no such recollection.
>
> MR. MAHONEY: He just said to you that is the justification for the question.
>
> THE COURT: I will sustain your objection.
>
> MR. BROUGHTON: With that on the record I have no further questions.

c. Again, during oral argument before the district court, government counsel, evidently to make certain that he had not misunderstood the nature of the disavowal by petitioner's counsel, stated that he "understood" that counsel was making no claim that "the arrest was made by the local authorities at the behest of the F.B.I." (R. 238). Counsel acknowledged that that was "the substance of" his statement (*ibid.*).

3. *Petitioner's detention by the Buffalo police; the events of the afternoon of January 10*

Petitioner and his two companions were taken by the arresting officers to the headquarters of the Buffalo police, where they arrived at approximately 11 a.m. (R. 50–51, 77–78, 90, 95, 98, 108). At their arrival a "big turmoil" was going on, resulting from the presence of a large number of newspapermen, photographers, and television cameramen in all of the hallways of the building with the exception of the fourth floor, where the cell block was located (R. 51, 90, 96, 208, 221). To "circumvent the [p]ress and the photographers," petitioner and his associates were not immediately "booked"[18]—as was the usual custom when arrested persons were brought into headquarters—but were taken directly by the elevator to the cell block, where they were placed in the custody of the cell block guard (R. 51, 77, 89–90, 95–96, 208–209, 220–221).

Shortly before noon, following the receipt of Golombeck's telephone call, agent Roche proceeded to the Buffalo police headquarters "to ascertain * * * whether or not anything had occurred relative to"

[18] "Booking" was explained as the process whereby the name and address of an arrested person were registered on a "blotter" kept for that purpose in the detective bureau (located on the third floor of the headquarters building), together with other personal information about the person, the time of arrest, the charge on which he was held (*i.e.*, "the reason why the Police Department * * * is holding" him pending the filing of a "formal complaint" or "Information" with a local court or magistrate), the name of the arresting officer, and the "final disposition" of the matter (R. 83–84, 210, 218–219, 220–221).

the bank robberies which the F.B.I. had under investigation (R. 108, 113–114). At headquarters, Roche saw Golombeck, Klenk and Dwyer, and was informed that petitioner and his companions "hadn't been questioned up to that moment" (R. 109, 114). Roche, Golombeck, Klenk and Dwyer then went to lunch together, following which, at about 2:30 p.m., Roche returned to the police station (R. 113, 114).[19]

For approximately an hour or an hour and a half, commencing around 2 p.m., Klenk saw "some F.B.I. men" in the detective bureau of the headquarters building (R. 78, 210). They did not question petitioner in Klenk's presence, and Klenk did not know whether their business there had to do with petitioner (R. 210).[20]

Commencing at about 2:30, petitioner was interrogated by a number of state and local officers concerning his connection with various offenses within their jurisdiction, including the Redlinski robbery, the burglary of the premises of one Sidell, the robbery of an individual in Niagara Falls (not more specifically identified), and the two bank robberies involved in these cases[21] (R. 64, 65, 84–85, 95, 109,

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[19] The facts stated in this paragraph were adduced in the M. & T. case only.

[20] The only F.B.I. agent whose presence at headquarters on the afternoon of January 10 otherwise appears from the record was agent Roche (see *supra*, pp. 18–19, and *infra*, pp. 20–22).

[21] Lieutenant Klenk testified that he interrogated petitioner concerning, among other crimes, "[t]he bank holdup at North End * * * and the holdup of the Market Bank out on Clinton Street" (R. 85). We have been informed by the United

209). Among the state and local officers who interrogated petitioner were members of the Buffalo Police Department (including Lieutenant Klenk and Chief Golombeck), officers of the Bureau of Criminal Investigation of the New York State Police, and the local (Erie County) District Attorney's office (including Mr. Dwyer, the District Attorney) (R. 51–52, 54–55, 64–65, 77, 79–80, 84–85, 95, 109, 209, 210, 219–220). In addition, petitioner appeared in two "show-ups" or "line-ups" conducted by the Buffalo police, to which the victims of various local crimes were invited to see if they could identify him as the person, or one of the persons, who perpetrated the crimes (R. 51, 55, 77, 98).

At about 3:30 p.m., Roche and Dwyer spoke to petitioner in a joint interview (R. 54, 109). Dwyer explained to petitioner who he was and who Roche was, told petitioner he was interested in him in connection with "a series of various crimes," and proceeded to question him about the Redlinski holdup (R. 109). After the conversation between Dwyer and petitioner had gone on for some time, Roche, according to the latter's testimony, "interjected and asked [petitioner] about the M. & T. bank robbery" (R. 109, 114). In connection with that robbery, Roche asked petitioner if he had any objection to the F.B.I.'s searching his home in Niagara Falls. Petitioner said he did not. Roche then explained to

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States Attorney that the banks referred to were the banks involved in these cases. Those robberies, as has been noted, constituted state as well as federal offenses.

petitioner that the F.B.I. had a form known as a "permit to search" and asked if petitioner had any objection to signing such a form. Petitioner said he did not. Roche then left Dwyer and petitioner and telephoned his office to request that one of the forms be sent him. When the form arrived, Roche took it to petitioner, who then declined to sign it, stating that he preferred that his home not be searched. (R. 109, 114–115.)

According to petitioner, Dwyer and Roche, in this interview, "asked me to come clean, they got me cold and I might as well look for the best way out" (R. 54). Petitioner was sitting between them, he said, and both were asking him questions (*ibid.*). Asked how long he was in the conference room with Dwyer and Roche, petitioner replied that "it was quite a while because I remember Mr. Dwyer was trying to hammer it in my head [that] if I signed a statement we could get some sort of a deal and be tried as a first offender and have all these crimes wrapped up in one, and I told them I wouldn't make no deal" (R. 54–55). "When Mr. Dwyer questioned me in front of Mr. Roche," petitioner further testified, "it was on the M. & T. Bank" (R. 64). Asked if "several other robberies" were not mentioned by Dwyer in addition to the M. & T. robbery, petitioner replied that "They pointed out their information on other robberies, but [said that] by cooperating on the M. & T. Bank I would get a break on everything" (R. 65). To the question, "Who said that?", petitioner replied, "Either Mr. Dwyer or Mr. Roche," adding

that he did not remember which because "Both men were talking at the same time" (*ibid.*).[22]

At or about 3:45 p.m. petitioner was "booked" (see fn. 18, *supra*, p. 18) on the Redlinski robbery charge, and at or about 4:15 p.m. he was booked on a second charge, for the Sidell burglary (R. 84, 91, 97–99, 209–210, 219, 220–221). However, no steps were taken by the police at this time to file a formal complaint on either charge in any court or before any magistrate, or to arraign petitioner on either charge (R. 78, 210, 216–217).

4. *Petitioner's confessions on the evening of January 10*

At approximately eight o'clock that evening, special agents Eddy and Jenson of the F.B.I., at the direction of agent Roche, proceeded to the Buffalo police headquarters for the purpose of interviewing petitioner (R. 15, 23–24, 188, 198). Eddy and Jenson had learned from Roche around noon of that day that petitioner had been arrested by the Buffalo police a short time previously and was then in their custody (R. 49, 189, 197, 198, 206, 207). Other agents arrived at police headquarters at about the same time as Eddy and Jenson for the purpose of interviewing D'Antuono and Simmons (R. 18–19, 27–28, 110, 198).

At the time of the agents' arrival, petitioner was participating in a lineup, the third of the day, which the police were conducting (R. 15, 16, 27, 55, 88, 189, 199, 211). Eddy asked for and obtained from Chief

[22] The facts stated in this and the preceding paragraph were adduced in the M. & T. case only.

Golombeck permission to interview petitioner (R. 190). Owing to petitioner's participation in the lineup, it was necessary for the agents to wait approximately an hour before petitioner became available (R. 16–17, 27, 189, 199).

At about 9 p.m., after the lineup proceedings had been concluded, petitioner was brought by the police to a small office adjacent to the cell block, which was made available to the agents for questioning (R. 17–18, 189, 200, 204–205). The interview began at 9:02 p.m. and was concluded at 12:54 a.m. (R. 18, 19, 25, 32, 43, 46, 190, 202). Agent Roche was present in the building throughout this period; on one occasion he entered the room where petitioner was being questioned to listen to the proceedings for a few minutes (R. 32–33, 38, 44, 47, 110, 227, 232). D'Antuono and Simmons were being simultaneously interviewed during this period by other F.B.I. agents at other locations on the cell block floor (R. 27–28, 87–88, 212–213).

At the commencement of the interview, agent Eddy advised petitioner that he did not have to talk or make any statement to the agents but that any statement he did make might be used against him, and that he had a right to an attorney (R. 22, 27, 31, 35, 36, 43, 201). Petitioner told the agents that he "understood those rules" and remarked that Eddy had "told them to him once before" (R. 22).[23] From 9:04 to 9:41 the agents, who did most of the talking during this period, pointed out to petitioner the information

[23] Petitioner had on a previous occasion, approximately two weeks following the M. & T. robbery, been interrogated by Eddy concerning that robbery (R. 5–6, 57).

they had received concerning his participation in the M. & T. Bank robbery and his recent activities[24] (R. 32, 36, 37, 46). At 9:41, 39 minutes after the interview began, petitioner started to tell the agents about "the crimes he was involved in", including the M. & T. and Liberty Bank robberies (R. 32, 33, 35, 43, 46; see R. 125–130, 240–244). He told the agents that he "was a gambler", that "as a gambler he had lost", and that he "was willing to lay his cards on the table and tell us what it was about" (R. 36). The period from 9:41 to 11:37 was spent in confessing orally to his offenses; commencing at 11:37 and continuing to shortly before the end of the interview (at 12:54 a.m.), he dictated to Eddy, and Eddy wrote down verbatim in longhand, a written confession of his role in the M. & T. crime (R. 34, 41–42, 45, 46, 47–48). Petitioner then read the statement and signed it (R. 41, 44–45).[25]

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[24] See *supra*, pp. 4–5.

[25] The facts stated in this paragraph are based on the testimony of agents Eddy and Jenson. Petitioner denied, at the Liberty Bank hearing, that he was advised by the agents that he was entitled to an attorney and that he did not have to make a statement (R. 235), and testified at the M. & T. hearing that he asked the agents during the interview to get him a lawyer—any lawyer—and to talk to the latter about the matters they were interrogating him about (R. 60, 66). He also gave other testimony, principally at the M. & T. hearing (but before neither jury), which, if true, would have shown his confessions to be involuntary (see fn. 8, *supra*, pp. 7–8).

The trial judge in the M. & T. case, following the hearing out of the presence of the jury, stated that, aside from the testimony of the petitioner that he confessed because the F.B.I. agents told him that his mother and wife were in jail, he saw no evidence that the confession was coerced or involuntary; that, since that testimony was contradicted by the agents, a "question

The agents' interview with petitioner was interrupted once for a period of from one to five minutes when District Attorney Dwyer entered the room to show petitioner "a boot which had been taken from another man" and ask him some questions about it (R. 32, 44, 47, 57–58, 185–186). The discussion had nothing to do with the matters the federal agents were discussing with petitioner (R. 44, 186). The agents did not enter into the conversation and did not pay much attention to what Dwyer and petitioner were talking about (R. 32, 186).

On two occasions during the interview (and the interviews of other agents with D'Antuono and Simmons, which were simultaneously going on),

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of fact" was presented; and that he would "submit it to the jury as a question of fact, the same as you would submit any question" (R. 121–122). Petitioner, however, did not repeat his testimony in the presence of the jury (he did not take the stand). In the Liberty Bank case, the judge, following the hearing in the absence of the jury, found that "there was nothing involuntary" about the confession; that no "force [was] used, either actual or psychological"; that "the statement is voluntary and not involuntary" (R. 236–237). He stated, however, that he would, nevertheless, "submit the question [of voluntariness]" to the jury to determine as a "question of fact" (R. 238). In each case, as we have noted (see fn. 8, *supra*, pp. 7–8), the judge did submit the question of voluntariness to the jury, notwithstanding that petitioner took the stand in neither case.

In the M. & T. case, agent Eddy repeated in the presence of the jury his testimony that he advised petitioner at the start of the interview of his right to counsel and to decline to make any statement (but that any statement he did make could be used against him) (R. 124). (He was not questioned on the point in the presence of the jury in the Liberty Bank case.) Thus, the uncontradicted testimony on this point in the presence of the jury was that petitioner was so advised.

Lieutenant Klenk went to the cell block for the purpose of interrogating the prisoners about matters he and the city police were interested in, and on a third occasion he went to procure them for purposes of another lineup. In each instance he desisted on seeing that their interviews with the federal agents were still in progress. (R. 80, 87–88, 212–213, 219.) He did so "[a]s a matter of courtesy", he explained (R. 88, 213, 219; and see R. 98). "[I]n case there are visiting policemen from other cities or towns or state police or F.B.I.", he said, "if we have a prisoner and they are talking to them we show them the courtesy of letting them talk to our prisoners" (R. 88). "I was able if I cared to", Klenk testified, to "take [the prisoners] away from [the agents]. They were our prisoners, but [the agents] were visiting headquarters and we showed them the courtesy of letting them talk with them" (R. 213).

Following the interview, the agents left the building to buy a package of cigarettes for petitioner (at his request), returned briefly to deliver them, and finally departed at about 1 a.m., leaving petitioner in the custody of the Buffalo police (R. 25, 34, 191, 192, 202). No request was made that evening by any F.B.I. agent to any member of the Buffalo police force that petitioner be delivered to the F.B.I. for arraignment (R. 202, 227).

5. *Petitioner's arraignment on the following day*

At approximately ten o'clock the following morning, January 11, 1957, a complaint charging petitioner with violations of the federal bank robbery statute

was filed, at Roche's direction, with the local United States Commissioner (R. 111, 224–225). At about the same time, Roche called Lieutenant Klenk [26] to request the Buffalo police to surrender custody of petitioner to the F.B.I. "so that they [the F.B.I.] could arraign him" on the federal charges (R. 85–86, 111, 215, 227). In the apparent belief that this would be agreeable to the Buffalo police, and that the police would transfer the custody of petitioner to the F.B.I. before 11 a.m., Roche made an appointment with the United States Commissioner for the purpose of arraigning petitioner on the federal charges at 11 a.m. (R. 111, 228). Klenk, after talking to Roche, called District Attorney Dwyer to tell him of Roche's request (R. 86, 215). Dwyer instructed Klenk to wait until he heard further from Dwyer before taking any further action (R. 86). Shortly thereafter, Dwyer called Klenk back and told Klenk and Golombeck to take petitioner and the other two prisoners to Dwyer's office (R. 86, 101, 215). Klenk and Golombeck, accordingly, took the three prisoners from the Buffalo police headquarters to Dwyer's office in the Erie County Hall, where they arrived shortly before 11 a.m., and where petitioner remained for approximately two hours (R. 86, 101, 215–216).

Meanwhile, when petitioner had not been brought to the United States Commissioner's office by 12:30 p.m. (it was Roche's understanding that petitioner

[26] Roche testified that he spoke to Chief Golombeck on this occasion (R. 111, 227). It is evident from the testimony of Klenk and Golombeck, however (see R. 85–86, 101, 215), that it was actually Klenk to whom Roche spoke. Cf. R. 229.

would be brought by the Buffalo police to the Commissioner's office, where, after being delivered to the F.B.I., he would be federally arraigned, Roche called the Buffalo police headquarters to determine the cause of the delay (R. 111). On learning that petitioner and the other two prisoners were at Dwyer's office, Roche proceeded there, where he was told by Dwyer that the prisoners had not yet been arraigned "on the State charges" and that arrangements to that end were then being made (R. 111, 228–229).

Around 1 or 2 p.m. an information charging petitioner with violations of the New York Penal Law (apparently relating to the Redlinski robbery and the Sidell burglary) was filed in the Buffalo City Court (R. 80, 84, 86, 92, 216–217, 219). This was the first time that any formal complaint was filed charging petitioner with a violation of state law (R. 216–217). Shortly thereafter, petitioner was arraigned on these charges in the same court (R. 62–63, 80, 102, 214). He was then delivered to the federal authorities and, at 4 p.m., was arraigned on the two federal robbery charges before the United States Commissioner (R. 62–63, 86, 101–102, 111, 214, 220, 225, 228).

Following the hearing in each case, the trial court ruled that petitioner's federal arraignment had not been unduly delayed and that no working arrangement, similar to that involved in *Anderson* v. *United States*, 318 U.S. 350, had been shown to exist between the F.B.I. and the Buffalo Police Department under which the police would arrest petitioner and hold him

for the F.B.I. to question (R. 117–121, 236–238). The court did not write an opinion in either case. The rulings are reflected in the following colloquies with counsel:

The M. & T. Bank case:

THE COURT: I am going to hold that * * * there was no unusual delay as a matter of law that would foreclose testimony of Agents Eddy, Jenson or any statement obtained during the course of that interview.

* * * * *

* * * Very frankly, about all I can say is here is a man suspected of several crimes, and here is information given—it seems to me entirely properly—it seems to me it would be a failure on the part of the F.B.I. if they didn't make it known to the local authorities that a crime, according to their information, was about to be committed. There is no evidence that they gave these local police any instructions; the local police do as they please. They arrested him, what seems to me, regularly. Here was a man that wasn't being held just for investigation for one simple matter; it was quite apparent the Buffalo police wished to interview him with regard to many matters, and investigation went on. * * * [R. 120–121.]

The Liberty Bank case:

THE COURT: * * * [T]he motion as to voluntariness and as to delay in arraignment under Rule 5–A are denied, and the defendant Coppola may have an exception.

* * * * *

* * * There was no delay in the arraignment or a violation of the Constitution as raised under

Rule 5–A, or any other rule of the Constitution of the United States.

* * * * * *

MR. BROUGHTON [government counsel]: May I ask your Honor, if you would hold that you find as a matter of fact no working agreement existing between the F.B.I. and the Buffalo Police Department with respect to the Buffalo Police arresting this man or men and holding them so the F.B.I. could question them.

THE COURT: That was a necessary prelude to the finding. * * * [R. 237–238.]

SUMMARY OF ARGUMENT

I

Petitioner does not challenge the rulings below on the issue of the voluntariness of his confessions, and we submit that these voluntary confessions of federal crimes to federal officers while in the custody of city police officers were properly admitted at his trials, even though at the time they were made, the detention had exceeded permissible limits under the local arrangement law, because the detention was not the result of connivance or collaboration with the federal officers of the sort involved in *Anderson* v. *United States*, 318 U.S. 350.

A. The confessions involved in the *Anderson* case were products of a true collaborative effort by state and federal authorities as they jointly sought to solve a single crime. The *Anderson* record shows that the federal agents and the state officers worked hand in hand, not only in the general investigation of the

crime but also in the interrogation of the prisoners, whom the state officials took into custody and detained (illegally, as this Court held and the government acknowledged) *for the primary if not the sole purpose of enabling the federal agents to interrogate them.* The record reflected joint action of the most intimate sort, for almost a week, as federal officers interrogated a county sheriff's prisoners, who, though technically in the custody of the State of Tennessee, were in fact arrested by the state officers for the purpose of questioning by federal officers, as part of a cooperative endeavor by the officers of the two sovereignties to solve a single crime constituting an offense against each.

B. The instant case is of a wholly different sort. The circumstances under which the confessions at bar were made have little in common with those of *Anderson* v. *United States.* The resemblances are wholly superficial, and in no way evidence the sort of "working arrangement" or "collaboration" between state and federal officers in a process of illicit detention and interrogation which was there found to taint the confessions.

1. Petitioner and his two companions were arrested by the Buffalo police following the receipt of information from the F.B.I. that they had committed a local robbery and were planning to commit another, both within the local officers' jurisdiction. The evidence is undisputed that the arrests were solely the act and responsibility of the local officers. No federal agent was present, and no agent requested such action. In the Liberty Bank case, moreover, counsel

for petitioner disavowed any claim that petitioner was arrested "at the behest of the F.B.I."—and the context shows that counsel thereby meant to concede that the arrest was not made at the request of the F.B.I.

There is no evidence, furthermore, that the arrests were made for the purpose (in whole or in part) of enabling the F.B.I. to question the arrested persons while in custody, or of otherwise accommodating a federal interest. In this lies the major distinguishing feature between the present case and the *Anderson* case. The evidence shows that the police and the prosecuting authorities of the State of New York, from beginning to end, had their own interests to serve, and that, on the whole, those interests were unrelated to those of the F.B.I.

The fact that the F.B.I. was the source of the information which led to the arrests in no way detracts from these conclusions. The furnishing of the information relating to the Redlinski robbery was no more than a normal and usual act of official (and commendable) cooperation between a federal and a local investigative agency. The information that petitioner and his associates were planning to rob a local tavern at a certain hour of a certain day was in the same category, except that this information pertained to a crime which was as yet uncommitted and so was preventable. The F.B.I. had no choice but to communicate this information to the police in order that appropriate action might be taken.

2. The telephone call by one of the arresting offi-

cers, Golombeck, to F.B.I. agent Roche, while the officers were on their way to police headquarters with the prisoners, advising Roche of the arrests, does not show that the arrests were made on behalf of or at the request of the F.B.I. The placing of this call is fully explained by Golombeck's testimony that he made the call as a courtesy to Roche for supplying him with the information which made the arrests possible.

3. Nor does the fact that Roche, following Golombeck's call, went to police headquarters to ascertain whether "anything had occurred relative to" the bank robberies the F.B.I. had under investigation, indicate that the arrests were made at the request or on behalf of the F.B.I. During the two preceding months the F.B.I. had been receiving periodic reports from its confidential informant, Buyers, in which Buyers reported what he was learning from petitioner about his own and his associates' criminal activities. Apparently, the F.B.I. did not wish to make an arrest until it had learned all that it could through Buyers. Petitioner's arrest put an end to the possibility of acquiring more information through Buyers. Consequently, the F.B.I. now desired to question petitioner and his associates in connection with the federal crimes it had under investigation, and it was doubtless with this in mind that Roche went to police headquarters as soon as he learned of the arrests. But there is nothing to indicate that any interview which the F.B.I. might succeed in arranging with the arrested men would be on any basis other than by leave of,

and at the convenience of, the local police, whose prisoners they were.

4. There was nothing of present significance, under the circumstances, in Roche's having lunch with the two police officers, Golombeck and Klenk, and the county District Attorney, Dwyer. Assuming (though the record is silent on the point) that the possibility of the F.B.I. agents' interviewing the prisoners was discussed at the luncheon, there is nothing which suggests that the discussion was in terms other than that the interviews would be at the convenience of the local officers and with their permission. Anything in the nature of a controlling hand in the proceedings on the part of the F.B.I. (surmised by the dissenting judges below) would be wholly out of keeping with the facts of record. And there was nothing improper about an F.B.I. agent's asking local officials for permission to interview persons in their custody.

5. The record of what actually took place at headquarters that afternoon and evening and on the following day shows that the custody of the prisoners was in the state, for state and local purposes, and related to state and local crimes, and that the limited and subordinate role played by the F.B.I. in the proceedings was by leave of the state and city authorities and subject to their convenience.

Thus, it appears that during the afternoon of the day of his arrest petitioner was extensively questioned by state and local officers concerning state crimes within the exclusive jurisdiction of the state and local officers. (There was, in addition, some state and local questioning concerning the bank rob-

beries here involved, but that fact is not inconsistent with our position since those crimes, being state as well as federal offenses, were as much matters of state and local concern as the crimes over which the local jurisdiction was exclusive.) Petitioner participated in lineups, or showups, conducted by the local officers for their own purposes, without any joinder by federal officers. The crimes for which he was booked by the police and for which he was locally arraigned the following day were purely local in character.

6. In only one instance did a state and a federal officer jointly interview petitioner, and even as to this interview it is not clear that there was any joint questioning pertaining to a single crime.

7. The F.B.I. interview of that evening, at which the confessions were made, was held only after the interviewing agents had secured police permission. Before the interview could begin, moreover, the agents had to wait until a lineup which was in progress when they arrived at headquarters had been concluded. The interview was interrupted on one occasion while a state official questioned petitioner about a state matter with which the federal agents had no concern. A police officer did desire, on several occasions during the federal interview, to interrogate petitioner about matters in which the police were interested and desisted upon seeing that the agents' interview was still in progress, but it is clear that he did so solely as a matter of courtesy.

8. The state and local officers' refusal on the following day to surrender the custody of petitioner

to the federal authorities for the latter's arraignment purposes until after they had accomplished the state arraignment further evidences the true character of the arrest and detention as non-federal.

9. The fact that prior to petitioner's apprehension the F.B.I. and the local police collaborated closely in attempting to solve the M. & T. Bank robbery does not indicate that there was a "working arrangement" (in the sense of the *Anderson* case) between the police and the F.B.I. in *arresting and detaining petitioner and interrogating him* concerning his part in that crime. Such commendable cooperation between state and federal law enforcement officers (*Elkins* v. *United States*, 364 U.S. 206, 221) cannot be the basis for an inference of illicit collaboration between such officers in depriving a prisoner of his rights.

The issue is factual and was resolved against petitioner by the two trial judges after full hearings and development of the relevant facts. These findings were confirmed by the court of appeals, and accordingly should be accepted here. The dissenting judges' views are based largely on surmise and conjecture; moreover, they lacked the advantage, which the trial judges had, of seeing and hearing the witnesses.

II

The fact that when petitioner confessed that he had been detained by local officers longer than was permissible under local law did not in itself make his confessions of federal offenses to federal officers inadmissible.

A. Petitioner's contrary view would read out of the *Anderson* decision the very basis on which that case was decided, *i.e.*, that there was connivance and collaboration by federal officers in the unlawful detention.

B. It also mistakes the holding and rationale of *McNabb* v. *United States*, 318 U.S. 332, upon which the *Anderson* opinion was based. *McNabb* v. *United States* established an exclusionary rule of evidence for federal trials, the purpose of which was to deter federal law enforcement officers from themselves becoming law-violators by failing to heed the command of the federal prompt-arraignment statutes. The rationale of the *McNabb* case is inapplicable where no federal wrongdoing is involved.

The only officers that federal courts can effectively control are federal officers. If an unlawful detention is not furthered or participated in by federal officers, a rule of exclusion in the federal courts would not tend to advance the objective of prompt arraignment under Rule 5(a), F.R. Cr. P. State officers enforcing state law would not be deterred from future violations of local detention provisions by an exclusionary rule in the federal courts. On the other hand, an exclusionary rule would mean that state officers could interfere seriously with federal prosecution.

C. The argument that the federal courts would somehow ratify or condone illegality if they were to admit a confession obtained during an illegal detention by state officers is not well founded. The federal rule of exclusion is applied, not because admission of the

evidence implies approval or ratification, but because federal exclusion effectively serves to keep federal law enforcement within proper bounds. The most that the federal courts can undertake to do is to make certain that federal officers conduct law enforcement activities within proper limits. "The use by [federal] prosecuting officers of evidence illegally acquired by others does not necessarily violate the Constitution nor affect its admissibility". *McGuire* v. *United States*, 273 U.S. 95, 99; see also, *e.g.*, *Burdeau* v. *McDowell*, 256 U.S. 465.

D. *Elkins* v. *United States*, 364 U.S. 206, is not opposed to these conclusions. That case held that evidence seized by state officers in violation of a *federal constitutional right*—the right under the Fourteenth Amendment to be free from unreasonable searches and seizures by state officers—is not admissible in a federal criminal trial. The instant case involves no claim of violation of a federal constitutional right,[27] or indeed of a federal right of any kind. The only violation was of the right to prompt arraignment under a local state statute. Moreover, evidence is excludable under the *Elkins* rule because the very act of the state officers in seizing it constitutes a violation of the constitutional right of the victim. Here, the contested evidence was obtained by federal officers who were innocent of any wrongdoing.

[27] The rule of the *McNabb* case is not incorporated into the Due Process Clause of the Fourteenth Amendment. See, *e.g.*, *Brown* v. *Allen*, 344 U.S. 443, 476.

E. Finally, the rule for which petitioner contends—that a confession made to federal officers while the defendant is being illegally detained by state officers is automatically excludable at the federal trial—would make the admissibility, in a federal court, of a voluntary and otherwise admissible confession of a federal offense, made to a federal officer, depend, if it happened to be made while in the custody of state or local officers, upon the widely variant laws of the states, not only in the field of arraignment following arrest but also in the field of arrest itself. Desirable uniformity of decision upon what is essentially a federal question would be precluded, and inquiry into the details of local law and the local precedents in these fields by courts having neither familiarity with, nor special competence in, the subject would be required in each case.

A federal officer desiring to question a person who is in local custody, in connection with an investigation in which the officer is engaged, should not be required to determine whether the custody of the prisoner was legally effected and is being legally maintained. To make inquiry into such matters—to check, in effect, on whether the local officials know their business and have lawfully carried it out—might be considered presumptuous and offensive. In any event, the federal agent should not have the task of determining whether the arrest or detention was unlawful under the rules of that particular jurisdiction.

ARGUMENT

The issue as to the voluntariness or involuntariness of petitioner's confessions in these bank robbery cases, which petitioner raised at both his trials, was in each case, following thorough canvassing, resolved against him in the district court (see footnotes 8 and 25, *supra*, pp. 7–8, 24–25), and petitioner made no claim in the court of appeals, and makes no claim in this Court, that the determination was erroneous. Rather, he argues that—under the rule of *Anderson* v. *United States*, 318 U.S. 350, and *McNabb* v. *United States*, 318 U.S. 332—the confessions, even though freely given, were inadmissible at his federal trials, because they were made to federal officers while he was illegally detained at the Buffalo police headquarters. In Point I, *infra*, pp. 41–69, we answer petitioner's argument that this detention in a city police station was the result of actual collaboration and connivance between state and federal officers of the kind which this Court held in the *Anderson* case should vitiate a confession obtained while the defendant was in such custody. In Point II, *infra*, pp. 70–83, we show that the mere fact that at the time when petitioner voluntarily confessed his federal offenses to federal officers he had been held by local officials longer than was permissible under local law does not make his confessions inadmissible at his trials for those federal crimes.

I

PETITIONER'S VOLUNTARY CONFESSIONS OF FEDERAL CRIMES TO FEDERAL OFFICERS WHILE IN THE CUSTODY OF CITY POLICE OFFICERS WERE PROPERLY ADMITTED, ALTHOUGH HIS DETENTION WAS IN VIOLATION OF LOCAL LAW, BECAUSE THE DETENTION WAS NOT THE RESULT OF CONNIVANCE OR COLLABORATION WITH FEDERAL OFFICERS OF THE SORT INVOLVED IN *ANDERSON* V. *UNITED STATES*, 318 U.S. 350

INTRODUCTORY

In *Anderson* v. *United States*, 318 U.S. 350, this Court, applying the rationale of *McNabb* v. *United States*, 318 U.S. 332, reversed federal convictions based on confessions made to federal agents while the defendants were being detained by state authorities in violation of a state statute—a statute prohibiting the commitment to prison of any person for a criminal matter prior to examination before a state magistrate. Pointing out that the defandants were not arrested and arraigned by federal authorities until days after they had been intensively questioned by the federal officers while in state custody and their confessions obtained, the Court concluded that "The considerations which led to that decision [*McNabb*] also govern this case" (318 U.S. at 355) because (p. 356):

> There was a working arrangement between the federal officers and the sheriff of Polk County which made possible the abuses revealed by this record. Therefore, the fact that the federal officers themselves were not formally guilty

of illegal conduct does not affect the admissibility of the evidence which they secured improperly through collaboration with state officers.

Petitioner urges (Br. 15–26), and the dissenting judges below concluded, that the *Anderson* decision and rationale govern this case. We submit, however, that the majority below correctly held this case to be decisively different in its facts, and thus not governed by that holding. Because of certain similarities—of a purely surface character, we believe—between the two cases, it will be necessary to analyze their respective facts in some detail.

We assume in our discussion that petitioner, at the time of his confessions to the federal officers on the evening of the day of his arrest, was being detained by the local police in contravention of local law. The New York arraignment statute (like Rule 5(a) of the Federal Rules of Criminal Procedure) requires that arrested persons be taken before a magistrate for preliminary examination "without unnecessary delay". Code of Criminal Procedure, § 165. Petitioner was apprehended at about 9:30 on the morning of January 10 and was not arraigned by the state until approximately 2 p.m. on January 11 (*supra*, pp. 11–13, 28). If petitioner's arrest, for purposes of this statute, occurred at the time of his apprehension, there would be little doubt that the local officers' failure to arraign him during the remaining business hours of that day constituted non-compliance with the statute, under the decisions of the New York

courts,[28] and the government so conceded in the court of appeals. The government did seek—at the oral argument before the *en banc* court—to sustain the legality of the local officers' detention of petitioner on

[28] The New York courts have construed the local arraignment statute as making it illegal for police officers to delay the arraignment of an arrested person in order to subject him to extended interrogation. *People* v. *Mummiani*, 258 N.Y. 394, 180 N.E. 94 (1932); *People* v. *Alex*, 265 N.Y. 192, 195, 192 N.E. 289, 290 (1934); *People* v. *Cohen*, 243 App. Div. 245, 249–250, 276 N.Y.S. 851, 855–856 (1935); *People* v. *Kelly*, 264 App. Div. 14, 16, 18, 35 N.Y.S. 2d 55, 57, 58 (1942); *People* v. *Redmond*, 265 App. Div. 307, 309–310, 38 N.Y.S. 2d 727, 729–730 (1942); *Bass* v. *State*, 196 Misc. 177, 182, 92 N.Y.S. 2d 42, 47 (Ct. of Claims, 1949); see, also, *People* v. *Elmore*, 277 N.Y. 397, 403–405, 14 N.E. 2d 451, 453–454 (1938); *People* v. *Snyder*, 297 N.Y. 81, 91–92, 74 N.E. 2d 657, 661–662 (1947); *People* v. *Lovello*, 1 N.Y. 2d 436, 136 N.E. 2d 483 (1956); *People* v. *Calebressi*, 233 App. Div. 79, 80, 251 N.Y.S. 603, 604 (1931); *People* v. *Trinchillo*, 2 A.D. 2d 146, 147, 153 N.Y.S. 2d 685, 686 (1956). Here, as the record shows, petitioner was extensively questioned by state and local officers during the afternoon of the day of his arrest (commencing at about 2:30) concerning various state and local crimes of which he was suspected (*supra*, pp. 19–20), and an acknowledged purpose of the police in detaining him was to subject him to such interrogation (R. 77, 95).

New York does not exclude confessions and incriminatory statements solely because they were made during a period of illegal custody; if otherwise admissible, such statements are received subject to the duty of the trial judge, upon request of counsel, to instruct the jury that it should consider the illegal character of the custody in determining whether the statements were voluntary. *People* v *Spano*, 4 N.Y. 2d 256, 260–261, 150 N.E. 2d 226, 228 (1958); *People* v. *Elmore*, 277 N.Y. 397, 404, 14 N.E. 2d 451, 454 (1938); *People* v. *Alex*, 265 N.Y. 192, 194–195, 192 N.E. 289, 290 (1934); *People* v. *Mummiani*, 258 N.Y. 394, 396, 180 N.E. 94, 95 (1932); *People* v. *Doran*, 246 N.Y. 409, 423, 159 N.E. 379, 384 (1927); *People* v. *Trybus*, 219 N.Y. 18, 22, 113 N.E. 538, 540 (1916).

the evening of the day of his arrest by the argument that his arrest, within the contemplation of the arraignment statute, did not occur until he was "booked" at police headquarters late that afternoon.[29] Nevertheless, both the majority and the dissenting opinions below treated the arrest as having taken place when petitioner was apprehended. The court thus, in effect, rejected the basis of the government's argument on this point, *i.e.*, that the arrest occurred when petitioner was booked. We accept the decision of the court of appeals on the point, and do not press it in this Court.[30]

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[29] Petitioner was booked for the Redlinski robbery at 3:45 p.m., and for the Sidell burglary at 4:15 (*supra*, p. 22). By agreement of counsel (see R. 289), 5 p.m. was the latest that arraignment could have been effected on that day in the Buffalo City Court (in which petitioner was in fact arraigned on the following day). The government argued, at the *en banc* hearing, that the intervening period of approximately an hour was so short that it was by no means clear under New York law that the local officers' failure to arraign petitioner within it was illegal, if, indeed, it would have been feasible to do so at all.

[30] Petitioner, in addition to contending that his arraignment was unreasonably delayed, argues that his detention was illegal from its inception—in other words, that his arrest was illegal (Br. 24–26). He relies on the fact that the police concededly had no arrest warrant, and on testimony by Chief Golombeck (in answer to a leading question by petitioner's counsel) that he was "holding him [petitioner] on suspicion" (Br. 25; R. 98–99). Golombeck indicated at another point in his testimony, however, that, at least in the case of petitioner, the arrest was based on probable cause for the belief that he had committed a felony, *viz.*, the Redlinski robbery (*supra*, p. 13), and this is a proper ground for arrest without warrant under the law of New York. See fn. 15, *supra*, p. 13. In any event, it is immaterial in this case whether the arrest was valid or not. The only relevant question is whether petitioner was being

A. THE CONFESSIONS IN THE *ANDERSON* CASE

As this Court undoubtedly viewed the record, the confessions involved in the *Anderson* case were products of a true collaborative effort at all stages by state and federal authorities (the sheriff and deputy sheriffs of Polk County, Tennessee, and agents of the F.B.I.) as they jointly sought to solve the identical crime, *i.e.*, the dynamiting of TVA-owned power lines and steel towers. The record shows that the federal agents and the state officers worked hand in hand with each other, not only in their general investigation of the dynamitings but also in the interrogation of the prisoners, whom, the evidence showed, the state officials took into custody and detained (illegally, as this Court held and the government acknowledged) *for the primary if not the sole purpose of enabling the F.B.I. agents to interrogate them.*

"When we first went into Polk County to investigate these dynamitings", one of the F.B.I. agents testified in the *Anderson* case (Record, No. 10, Oct. Term, 1942, pp. 427–428)—

> Agent Mann and I first contacted Sheriff B. E. Riggs and had a conference with him about what he thought of these various dynamitings and discussed with him who he might suspect. He told us at that time that he did suspect quite a number of people and we had a dis-

illegally detained when he made his confessions to the F.B.I. agents. As indicated in the text, we do not dispute that he was, by reason of the failure of the police to arraign him with the promptness required by New York law. Even if it were to be assumed, *arguendo*, that his detention was illegal from the beginning, no pertinent factor would be added to the case.

> cussion at that time, he mentioned 80 or 90 individuals possibly that might be involved in such a thing and we discussed with him the manner and method to use to talk with those various men. We had a right to talk to any individual and of course couldn't very well talk to them unless they were in custody. * * *

No mention was made in the agents' first discussions with the sheriff "about taking anybody into custody" (*id.*, p. 428). The sheriff merely told the agents that he "would make deputy sheriffs available to us to take us to these various places to talk to anybody", and the agents in fact "talked to quite a number who were not in custody" (*id.*). Subsequently, however, following the receipt by the sheriff of information from a confidential informant that certain men, whom the informant identified, were present at a meeting at which "dynamiting was discussed" (*id.*, pp. 192, 428), the sheriff and the agents had another conference at which (p. 428; see, also, p. 192)—

> Mr. Biggs [the sheriff] said he was going to lock all of them up who were at that meeting and we [the agents] concurred to this extent. We told him we would like to talk to these individuals very much * * *. We didn't make any special request of the sheriff to take them into custody but we did say we wanted to talk to them and we told Sheriff Biggs that we wanted to talk to them and that we were interested in talking to them. * * *

The sheriff proceeded to "lock up everybody Long [the confidential informant] had mentioned" (Record, p. 192; see 318 U.S. at 352). While according to the

sheriff the prisoners were "arrested on State charges" (Record, pp. 540, 542), F.B.I. agent Mann testified (*id.*, p. 475):

> The Sheriff took these various prisoners in custody so we could talk to them, so all of us could talk to them, so they would be available to the agents and the sheriff and they could talk to them and that was the purpose in taking them into custody.

The same agent further testified (pp. 333–334):

> X. You did tell him [the sheriff] you wanted to talk to them, and you couldn't talk to them unless they were in custody? A. That is true, yes, sir.
>
> X. Then the sheriff took them into custody so you could talk to them? A. That is right.
>
> X. So, as a matter of fact, all these defendants were arrested, picked up and put in jail so you and Mr. Roche and these other agents could talk to them? A. The sheriff picked them up on his own accord; I did not direct the sheriff to pick up any individual.
>
> X. The sheriff picked them up so you and these other agents could talk to them? A. Of course, that was the purpose, we wanted to talk to anybody he picked up.

Not only did the sheriff place the suspects in custody in order that the F.B.I. agents might interrogate them, but he also requested the agents to interrogate them. "When we first came into the Basin", the F.B.I. agent-in-charge testified, "he [the sheriff] told us he suspected certain parties and told us he wanted us to examine them" (Record, p. 492; see, also, pp. 172–173).

Following their apprehension, the arrested individuals, instead of being taken before a "magistrate or other committing officer, as required by Tennessee law", were taken, as stated by this Court, "to the company-owned Y.M.C.A. building in Copperhill, which was being used by the sheriff and his special deputies as their headquarters" (318 U.S. at 352). There they were "questioned by the federal agents intermittently over a period of six days during which they saw neither friends, relatives, nor counsel" (*id.*, p. 353. The confessions in issue "were the fruit of this interrogation" (*ibid.*).

Some of the prisoners were kept part of the time in one or the other of two local jails (318 U.S. at 353, 354, 355; Record, pp. 179, 180, 188, 201–204, 248). Illustrative of the "working arrangement between the federal officers and the sheriff of Polk County which made possible the abuses revealed by this record" (318 U.S. at 356)—the decisive element in the *Anderson* case—was the testimony of an F.B.I. agent that, if he wanted to talk to a prisoner who was not in the Y.M.C.A. building at the time, he would make his wishes known to the sheriff, who would then make arrangements to have the prisoner brought to the agent for questioning (Record, p. 181):

> Q. You told Sheriff Biggs, "I want to see Earl Hubbard" and he got him, is that correct? A. That is right.
>
> Q. And told him that in reference to Ed Simonds? A. Told him that in reference to all the individuals he had in custody.

> Q. In other words, he would go get those men and bring them to the YMCA, so you could talk to them? A. That is right.

See, also, pp. 305, 306, 375, where other agents testified to the same effect.

The intimacy of the federal officers' "collaboration with state officers" as they "secured [evidence] improperly" (318 U.S. at 356) was evidenced by a great many other facts which might be cited from the *Anderson* record. For example, though apparently neither the sheriff nor his deputies took active parts in the questioning of the prisoners,[31] the sheriff was frequently if not usually present during their interrogation by the federal officers (Record, pp. 196, 235, 254, 255, 309, 334, 432). The sheriff was likewise present at some of the federal agents' meetings at which the investigation was discussed at length and courses of action planned (*id.*, pp. 169–170, 334–335, 436–437, 472–473, 492), including one at which the participants "went over a list of individuals that we thought might possibly be implicated" (p. 170). On at least one occasion a federal officer accompanied a deputy sheriff as the latter transported a prisoner from one of the local jails to the Y.M.C.A. building (p. 400). Two federal agents and two deputies once

[31] The sheriff himself, it appears, left the questioning of the prisoners largely if not entirely to the F.B.I. agents. With regard to the deputy sheriffs, the F.B.I. agent-in-charge testified that they "were not in any way interested in the investigation or questioning of these men" (Record, p. 495). The deputies' duties were, apparently, primarily the guarding and transporting of the prisoners (see, *e.g.*, *id.*, pp. 171, 172, 200–201, 204, 224, 247–248, 268–269, 375, 400, 431).

jointly retrieved an auger which one of the prisoners stated in his confession he had dropped into a river after it had been used in the dynamitings (pp. 417, 437–439, 442–443). On one occasion the sheriff, at the request of the federal officers, made arrangements for three of the prisoners, following their making of incriminating admissions, to spend the night together at one of the local jails, at their request, so that they might collaborate on a written statement (pp. 188, 195, 196, 275–276). In two instances federal agents and a deputy sheriff together picked up a suspect and transported him to the Y.M.C.A. building for questioning[32] (pp. 530–533, 535–539, 559, 633, 635, 746–748, 754–755, 764–766, 792–793, 795–798). In short, the record reflected intensive joint action, for almost a week, as federal officers interrogated a county sheriff's prisoners, who, though technically in the custody of the State of Tennessee, were in fact arrested by the state officers for the principal if not the sole purpose of enabling the federal officers to question them—all as part of a cooperative endeavor on the part of the officers of the two sovereignties to solve a single crime constituting an offense against both.

B. THE CONFESSIONS AT BAR

The instant case is of a wholly different sort. The circumstances under which the confessions were made

[32] The evidence was conflicting in these instances as to whether the persons picked up were arrested, or accompanied the officers voluntarily. According to the agents and the sheriff, the men came voluntarily (pp. 530–533, 535–539, 559, 792–793, 795–798).

have little in common with those of the *Anderson* case. The resemblances are wholly superficial, and in no way evidence the sort of "working arrangement" or "collaboration" between state and federal officers in a process of illicit detention and interrogation which was there found to taint the confessions. We shall review the pertinent facts of this case to show that the circumstances here fall far short of the type of "working arrangement" with which the Court was concerned in *Anderson* v. *United States*.

1. *The arrest.*—Information came to the attention of the chief of detectives of the Buffalo Police Department through the F.B.I. that petitioner and two companions (D'Antuono and Simmons) were the perpetrators of a recent crime within the investigative jurisdiction of the city police, the robbery of a Buffalo butcher named Redlinski. Photographs of the three men were supplied, and the victim of the holdup identified petitioner, through his photograph, as one of his assailants. Two days later, the city officer received additional information, from the same source, that the same three men were planning a second holdup, the robbery of a Buffalo tavern, possibly the El Chico on Clinton Street, at ten o'clock on the following morning, January 10. This crime would also have been one within the jurisdiction of the local police. On the morning of the 10th, the officer stationed patrolmen at strategic locations in the threatened area to prevent any holdup attempt, proceeded himself with two other city officers to the area, found there the men about whom he was warned,

apprehended them, and took them to police headquarters for questioning. See the Statement, *supra*, pp. 9–13.

The evidence is undisputed that the arrests were solely the act and responsibility of the Buffalo police. The decision to take the three men into custody was solely that of the local officers; no federal agent was present, and no agent requested such action (R. 82, 101, 116). In the Liberty Bank case, moreover, counsel for petitioner disavowed any claim that petitioner was arrested "at the behest of the F.B.I." He argued, consequently, that any testimony on the point would be irrelevant—a contention which the trial court sustained (*supra*, pp. 15–17).

The dissenting judges below seek to discount the significance of this disavowal by saying that it was made "in the heat of trial", and by distinguishing between "behest" and "request" (R. 306–307). On the latter point they say, "The word 'behest' is synonymous with *order* or *command* or *mandate*, and hence this purported concession still leaves untouched appellant's contention that his state apprehension and subsequent detention were at the *suggestion* and *request* of a federal officer" (*ibid.*; emphasis in the original). Neither point has validity. The suggestion that the concession was made "in the heat of trial"—a contention which, significantly enough, counsel himself does not make—is refuted by the record. The concession was made at the second (Liberty Bank) trial, after it had been shown at the M. & T. trial that the arrest had not been made at the request of or on behalf of the F.B.I. Moreover, the concession was made, not once, but three times—at intervals spaced

over twenty pages of the printed record (R. 217–218, 230, 238; see *supra*, pp. 15–17). The last occasion was during oral argument before the district court, in reply to a query by government counsel, who, to make sure he had not misunderstood the nature of the disavowal, stated his "understand[ing]" of it; counsel for petitioner acknowledged that government counsel had correctly stated its "substance" (R. 238; *supra*, p. 17).

With respect to the distinction which the dissent makes between "behest" and "request", it seems extremely doubtful that, in the context in which the concession was made (*supra*, pp. 15–17), counsel had any such distinction in mind. Petitioner makes no argument based on such a distinction here. It is clear, in any case, that as a consequence of defense counsel's disavowal the government refrained from developing the point further (R. 230); indeed, it was prevented from doing so by rulings of the court sustaining objections by the defense (R. 217–218, 230). In these circumstances any ambiguity that might be thought to survive as to whether counsel intended to concede that petitioner's arrest was not at the "request" of the F.B.I., or merely that it was not at the "command" or "order" of the F.B.I., should not benefit petitioner or be ground for disturbing the trial judge's findings—particularly since it is clear that the F.B.I. had no authority to give "orders" to the police, so that the most favorable possible inference which could be drawn from the record (from petitioner's viewpoint) is that the police acted at the F B.I.'s request. As stated above, the undisputed testimony in the M. & T. case (in which no concession

was made by defense counsel) was that petitioner's arrest was not requested by the F.B.I.

Nor is there any evidence—with the possible exception of Chief Golombeck's telephone call to F.B.I. agent Roche while the arresting officers were on their way with the prisoners to police headquarters, informing Roche of the arrests (*supra*, p. 14; *infra*, pp. 56–57)—that the arrests were made for the purpose (in whole or in part) of enabling the F.B.I. to question petitioner and his associates while in custody, or of otherwise accommodating a federal interest. In this lies the major feature distinguishing this case from the *Anderson* case. The evidence shows that the Buffalo police and the prosecuting authorities of the State of New York, from beginning to end, had their own interests to serve and that, by and large, those interests were totally unrelated to those of the F.B.I. (although admittedly in the case of two of the crimes concerning which petitioner was questioned by the local officers—the bank robberies here involved—the local and the federal interests coincided).

The fact that the source of the information which led to the arrests was the F.B.I. in no way detracts from these conclusions. The furnishing of the information relating to the Redlinski robbery was, clearly, no more than a normal and usual act of official cooperation between a federal and a local investigative agency. Having received in the course of its regular investigative activities information relating to a crime outside its investigative jurisdiction, the F.B.I. passed the information on to the agency within whose jurisdiction the offense did lie—the local police department. The furnishing of this information was but an ex-

emplification of that "[f]ree and open cooperation between state and federal law enforcement officers" which, as this Court has said, "is to be commended and encouraged" (*Elkins* v. *United States*, 364 U.S. 206, 221). Indeed, it was the duty of the F.B.I. to furnish this information to the police, just as it would have been the duty of a private citizen who happened to come into possession of such information.

The second item of information furnished by the F.B.I.—that petitioner and his associates were planning to rob a local tavern at a certain hour of a certain day—was in the same category, except that this information pertained to a crime which was as yet uncommitted and so was preventable. Obviously, the F.B.I. had no choice but to communicate this information to the police in order that appropriate action might be taken. It would have been "a failure on the part of the F.B.I.", as remarked by the trial court in the M. & T. case, "if they didn't make it known to the local authorities that a crime, according to their information, was about to be committed" (R. 121).[33]

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[33] Compare Judge Moore's observation in his dissent from the original panel judgment of the court of appeals: "Surely no one would advocate their [the F.B.I.'s] remaining silent and not informing the local police [about petitioner's alleged participation in the Redlinski robbery and the robbery to be perpetrated on the morning of the 10th]" (R. 276).

The same considerations explain the F.B.I.'s giving of the information about the planned tavern robbery to Dwyer, the local district attorney (*supra*, pp. 10–11). As F.B.I. agent Roche explained, he gave Dwyer this information "so that he might take whatever action he desired to protect the citizens of Buffalo and to prevent, if possible, another hold-up" (R. 108). Nor is there significance in the fact that Roche mentioned to Dwyer on the occasion of his visit that the F.B.I. had been

2. *The telephone call from city detective Golombeck to F.B.I. Agent Roche.*—At about 11 a.m., shortly following the arrests, Golombeck placed a telephone call to Roche, the F.B.I. agent who had supplied the information which led to the arrests. Golombeck told Roche that the three men, the subjects of Roche's information, had been discovered by the police in the vicinity of the El Chico (the tavern which, according to Roche's information, was possibly the object of the suspects' holdup plans), that they had been arrested, and that the police were then on their way to police headquarters with them (R. 108, 113). The dissenting judges below lay considerable stress on this telephone call and purport to find in it weighty support for their theory of the case (R. 304–305, including fn. 5). They say that the placing of this call by Golombeck before the police officers had even arrived at headquarters with the prisoners is inconsistent with the majority's conclusion that "the state concentrated on its own business first" (R. 305, fn. 5; R. 288). Petitioner likewise stresses this call (Br. 19–20). We submit that these arguments attach undue significance to the incident.

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investigating petitioner in connection with the M. & T. and Liberty Bank robberies and the "contemplated" robbery of a third Buffalo bank (*ibid.*). The M. & T. and Liberty Bank robberies were state as well as federal offenses (as would also have been a holdup of the third bank) and hence of as much official interest to Dwyer as to Roche. It was only natural, therefore, that Roche should mention to Dwyer that the F.B.I. had petitioner under investigation in connection with these bank robberies.

The placing of this call certainly took no more than a couple of minutes. Golombeck testified that he made the call as "a courtesy extended to [Roche] for supplying me with the information" (R. 102) which led to the arrests. The arrests were plainly a matter of importance to the police, as they must have been to the citizens of Buffalo generally.[34] It was the F.B.I.'s information which made the arrests possible. It is unnecessary to probe for a deeper motive than the one which Golombeck gave to account for his taking the minute or two needed to call the agent who supplied the information and let him know (doubtless with an expression of thanks) that the F.B.I.'s informant evidently knew whereof he spoke. Roche's testimony that he was "not necessarily" expecting Golombeck's call but that he "thought" Golombeck would call "if anything had developed" (R. 115–116) is consistent with and supports Golombeck's explanation.

3. *The arrival of F.B.I. agent Roche at police headquarters.*—The fact that within an hour after receiving Golombeck's call F.B.I. agent Roche proceeded to the Buffalo police headquarters "to ascertain * * * whether or not anything had occurred relative to" either of the two bank robberies the F.B.I. had under investigation (R. 108, 113–114) is likewise wholly consistent with the interpretation of events by the court below, and gives no support to the minority's view that the local police, in making the arrests and detaining the prisoners, were acting,

[34] Cf. *supra*, p. 18.

"at least in part, to satisfy the desires of the FBI" and at the latter's request (R. 303, 306–307).

It is true that the arrests were of great interest to the F.B.I. and that the federal agents desired to talk to the prisoners in connection with the M. & T. and Liberty Bank robberies. The F.B.I. had had these crimes under investigation from the dates of their commission, on February 15 and October 2, 1956, respectively. On November 5, 1956 (two months prior to the arrests), petitioner had admitted his implication in both offenses to the F.B.I.'s confidential informant, Buyers, who promptly reported petitioner's admissions. In the succeeding two-month period, Buyers continued to learn from petitioner more and more information about his criminal activities (past and contemplated), including the identity of his associates, and was reporting what he learned to the F.B.I. as he learned it.[35] *Supra*, pp. 4–5.

While petitioner's admissions to Buyers undoubtedly constituted sufficient grounds on which to base a federal warrant for his arrest for the two bank robberies, the F.B.I.—presumably in order to make as thorough an investigation as possible of the robberies (and in particular to learn the identities of petitioner's confederates) before tipping its hand by a premature arrest—had, so far as appears, taken no steps towards the obtaining of a warrant or the making of an arrest as of early January. The Redlinski robbery of January 4 (which the F.B.I. learned—

[35] The F.B.I., as we have noted, was in "daily contact" with Buyers from November 5, 1956, to January 10, 1957, the day of the arrests (R. 142).

presumably from Buyers—was committed by petitioner and his associates, D'Antuono and Simmons) and the planned perpetration by the same three men of another robbery on the morning of January 10 compelled the F.B.I. to communicate what it knew about these crimes (the projected as well as the consummated) to the local police. The arrest of the three men obviously put an end to the possibility of acquiring from petitioner, through Buyers, any further information about the two bank robberies. The state arrest also made it impracticable for the F.B.I. itself to arrest petitioner on the federal charges; he was already arrested and in custody. In these circumstances, the F.B.I. naturally desired to interview petitioner and his associates as soon as possible. It was with this in mind that agent Roche went to the Buffalo police headquarters upon learning from Detective Golombeck that the men had been arrested. But there is certainly nothing in any of this to indicate that any interview which the F.B.I. might succeed in arranging with the arrested men would be on any basis other than by leave of, and at the convenience of, the local police, whose prisoners they now were. Everything that had happened up to this time, and that was to happen during the rest of that day and on the following day (see *infra*, pp. 59–67) fully supports that conclusion and refutes the dissenting view that the local police, in arresting and holding the men, were acting on behalf of and at the request or suggestion of the F.B.I.

4. *The lunch of the federal and state officers.*—Agent Roche was informed at police headquarters

that petitioner and his companions had not yet been questioned, following which Roche, Golombeck (chief detective), Klenk (police officer), and Dwyer (state district attorney), went to lunch together. The dissenting judges "suggest" that the arresting officers "were instructed not to commence questioning Coppola" until "after the FBI's desires could be ascertained", and "suggest further" that "the course of the afternoon's interrogation was determined at the meeting of [these four officers] at lunch, and that Roche had an important part in decisions there reached" (R. 306). This is sheer conjecture, with no support in the record.[36]

There was certainly nothing unusual about these four officers, at least three of whom (Roche, Golombeck, and Dwyer) were personal acquaintances from past associations, having lunch together.

The record is silent as to what they discussed at lunch. While it is natural to assume that they discussed the case, including the arrests and the plans of the state and local officers to interrogate the prisoners, it would seem far more likely (in the light of such evidence as there is) that, if interviewing of the prisoners by the F.B.I. was discussed at all, the discussion was in terms of the federal interviews' being conducted at the convenience of the local offi-

[36] There had, in fact, already been some questioning of the arrested individuals—as to what they were "going to do" and what they had in their automobile—at the time of the arrests (R. 84). Probably the police officers, in informing Roche upon his arrival at headquarters that the men "hadn't been questioned up to that moment" (R. 114), meant that they had not been questioned about past offenses.

cers and with their permission, than that the F.B.I., through agent Roche, "had an important part" at the luncheon in "determin[ing]" the "course of the afternoon's interrogation"—as the dissenting judges have surmised. Indeed, anything in the nature of a controlling hand in the proceedings on the part of the F.B.I. is wholly out of keeping with the facts of record.

On the other hand, there was nothing improper about an F.B.I. agent's asking local officials for permission to interview persons in their custody. It is not uncommon for officers of one investigative group to seek an interview with a person detained by another law enforcement agency, and such interviews are frequently permitted in the normal course of mutual cooperation and courtesy in the unraveling of the threads of crime. There is nothing illegal or inappropriate in such a practice. For further discussion, see *infra*, pp. 72–74, 83.

5. *Extensive questioning of petitioner by state and local officers, alone, for their own purposes.*—The record of actual events at headquarters that afternoon and evening and on the following day shows, we believe, that the state alone had custody of petitioner and his associates, for state and local purposes, related to state and local crimes; and that the limited and subordinate role played by the F.B.I. in the proceedings was at the sufferance and permission of the state and city authorities and subject to their convenience.

Commencing at about 2:30 p.m., petitioner was extensively questioned by state and local officers con-

cerning what part, if any, he had in various state crimes. In addition, he participated in at least two lineups, or showups, which were conducted by the Buffalo police for purposes of their own, without any participation by any federal officer. Among the interrogating state and local officials were officers of the police department, members of the Bureau of Criminal Investigation of the New York State Police, and representatives of the county District Attorney's office, including Mr. Dwyer, the District Attorney. The crimes concerning which these officers questioned petitioner included, and appear to have consisted principally of, offenses within exclusive state or local jurisdiction, *i.e.*, crimes to which the F.B.I.'s jurisdiction did not extend and with which, consequently, it had no official concern. *Supra*, pp. 19–20. Thus, it appears that the state and city officers interrogated petitioner concerning the Redlinski robbery, the Sidell burglary, the robbery of an unidentified individual in Niagara Falls, and possibly other purely local offenses (*supra*, p. 19). At 3:45 and 4:15 p.m., respectively, petitioner was "booked" for the Redlinski and Sidell crimes (*supra*, p. 22), the offenses for which he was locally arraigned the following day (*supra*, p. 28). In addition to interrogating petitioner concerning these purely local crimes, Lieutenant Klenk of the city police, and possibly Mr. Dwyer, the District Attorney (the evidence is less clear as to him), questioned petitioner concerning the two crimes—the M. & T. and Liberty Bank robberies—involved in these cases (see *supra*, pp. 19, 20–22, including fn. 21). The latter fact, how-

ever, does not indicate that either of the local officers was thereby serving the interests of the F.B.I. For those robberies were state as well as federal offenses, and the state and local officers had, consequently, fully as legitimate an official interest in those crimes as in the crimes over which their jurisdiction was exclusive.

In short, here, unlike the situation in the *Anderson* case, it appears that the state and local officers were themselves pursuing their own interests; that those interests were, in the main, unrelated to any federal interest; and that, insofar as there was an overlapping of interest (as in the case of the M. & T. and Liberty Bank robberies), the state and local officers pursued their interest independently of the federal officers.

6. *Short joint questioning of petitioner by a state and a federal officer.*—The fact that at one point in the afternoon's proceedings F.B.I. agent Roche and District Attorney Dwyer questioned petitioner in a joint interview is not inconsistent with these conclusions. According to petitioner, Dwyer questioned him "in front of Mr. Roche" "on the M. & T. Bank" matter. He further testified that "they" "pointed out their information on other robberies" and told him that "by cooperating on the M. & T. Bank [he] would get a break on everything." However, in response to the question, "Who said that?", he replied that he did not remember which of the two officers said it because "Both men were talking at the same time." *Supra*, pp. 21–22. According to Roche's version of this interview, on the other hand, Dwyer, in Roche's presence,

told petitioner he was interested in him in connection with "a series of various crimes", and proceeded to question him about the Redlinski holdup. After the conversation between Dwyer and petitioner had gone on for some time, Roche said, he interrupted them to ask petitioner about the M. & T. robbery. This was followed by Roche's attempt (which ultimately proved unsuccessful) to obtain from petitioner written authorization to search his home, in connection with which Roche left Dwyer and petitioner to telephone his office. *Supra*, pp. 20–21. It does not appear from Roche's testimony that there was any further discussion between him and petitioner about either bank robbery, in the presence of Dwyer or otherwise.

Whichever version of this joint interview [illegible] rect,[37] there is nothing in it at war with our contention that the federal and local officers acted substantially independently in interviewing and interrogating petitioner, as each group went about its own business and pursued its own interests. Assuming *arguendo* the correctness of petitioner's account, the most that it establishes is that a state officer and a federal agent, during a relatively brief period in the day's proceedings, jointly questioned petitioner about a crime in which they had a common jurisdictional interest. This isolated incident would be far from sufficient to warrant the equating of the proceedings in

[37] The testimony relating to the interview was given only at the M. & T. hearing. There is no indication as to which account of it (to the extent there may be thought to be a conflict in the testimony) the trial judge credited.

this case, as a whole, to the sort of protracted joint endeavor, extending for almost a week, that was involved in the *Anderson* case, or to require or warrant the application of the rationale of the *Anderson* opinion to the wholly different circumstances shown here.

7. *Questioning of petitioner by the F.B.I. agents alone, and petitioner's confessions.*—That evening, beginning shortly after nine o'clock, petitioner made the confessions in issue to agents Eddy and Jenson of the F.B.I. (*supra,* pp. 22–26). As noted by the majority below (R. 289), the agents' interrogation of petitioner did not contribute to any delay in his arraignment by the local officers on the state charges. This is because, as both counsel agreed upon oral argument, petitioner "could not have been arraigned after 5:00 P.M. on January 10, 1957 in the Buffalo City Court", and the next time he could have been arraigned was the following morning (*ibid.*). The events of that evening, moreover, further demonstrate the local character of the prisoners' custody and the fact that the federal officers' interrogation of the prisoners, far from constituting the objective of their arrest and detention, was incidental to the purposes of the local officers, conducted only by their leave and subject to their convenience. The evidence established that the interviewing federal agents had to wait approximately an hour following their arrival at headquarters in the evening before they could commence their interview, since petitioner was then participating in a lineup (the third of the day) for the

local police (*supra*, pp. 22-23).[*] The federal interview was conducted only with the permission of the local police, which agent Eddy testified he obtained from Chief Golombeck prior to its commencement (*supra*, pp. 22–23). The interview was interruped by District Attorney Dwyer, who, while the agents waited, questioned petitioner about a matter which had nothing to do with the subjects the agents were discussing and to which the agents paid little or no attention (*supra*, p. 25).

It is true that Klenk, the police lieutenant, went to the cell block on two occasions during the federal agents' interview with petitioner (and the interviews of other agents with the other two prisoners, which were simultaneously going on) for the purpose of interrogating the prisoners about matters the city police were interested in and on a third occasion went to procure them for purposes of another lineup, and that in each instance he desisted on seeing that the agents' interviews were still in progress. The evidence is clear, however, that the city officer refrained on each occasion solely as a matter of courtesy to the federal officers. Klenk could, if he had chosen, as he testified, have taken the prisoners away from the agents since they were "our prisoners". But in deference to the fact that the agents were "visiting headquarters", Klenk "showed them the courtesy of letting them talk with" the prisoners. *Supra*, pp. 25–26.

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[*] We have previously noted (*supra*, p. 62) that these lineups were carried on by the police independently of the federal officers and pursuant to their own interests.

8. *Delay in federal arraignment due to local officers' insistence on prior state arraignment.*—Finally, there is the significant fact that the local authorities refused on the following day to surrender petitioner to the federal authorities before they had arraigned him on state charges (*supra*, pp. 26–28). This shows that the state and local officers considered petitioner to be their prisoner at all times, and that they refused to subordinate their interests to those of the federal authorities until it suited their own operations.

9. *Prior investigative collaboration of federal and state officials.*—The fact that, as petitioner stresses (Br. 16–18), prior to petitioner's apprehension the F.B.I. and the Buffalo police collaborated closely with each other in attempting to solve the M. & T. Bank robbery[20] (*supra*, pp. 14–15) does not indicate that there was a "working arrangement" (in the sense of the *Anderson* opinion) between the police and the F.B.I. in *arresting and detaining petitioner and interrogating him* concerning his part in that crime. Such "[f]ree and open cooperation between state and federal law enforcement officers is to be commended and encouraged", as this Court observed in *Elkins* v. *United States*, 364 U.S. 206, 221, and can scarcely be the basis for an inference of illicit collaboration between such officers in depriving a prisoner of his rights. As observed by the court below, "'If this cooperation [between the F.B.I. and the police in attempting to solve the M. & T. case] reached the point of arrest and detention by [the] local police for the purpose

[20] There was presumably, as we have noted, similar collaboration with respect to the Liberty Bank robbery, but there is no evidence on the point.

of enabling [the] federal officers to question the defendants concerning the bank robberies for a period of time forbidden to federal officers by Rule 5(a) of the Federal Rules of Criminal Procedure, admissions thus obtained would be properly excluded. Such a rule prevents federal officers from evading the letter and the spirit of Rule 5(a). The rule excludes confessions when the 'working arrangement' includes the illegal detention—in other words, when federal law enforcement officers induce state officers to hold the defendant illegally so that they may secure a confession. However, to bring a case within this rule there must be facts, as there were in *Anderson*, not mere suspicion or conjecture" (R. 290–291). Without such facts, absent here, it is impermissible to jump from appropriate collaboration in investigation to unlawful collaboration in illegal detention and questioning.

The record shows, in sum, cooperation and mutual courtesy between the federal and local authorities as each group went about its own business; it does not show a "working arrangement" resulting in a "collaborati[ve]" deprivation of prisoners' rights in the sense condemned in *Anderson* v. *United States*. Cf. *White* v. *United States*, 200 F. 2d 509, 511–513 (C.A. 5), certiorari denied, 345 U.S. 999; *Brown* v. *United States*, 228 F. 2d 286, 289 (C.A. 5), certiorari denied, 351 U.S. 986; *Horne* v. *United States*, 246 F. 2d 83 (C.A. 5), certiorari denied, 355 U.S. 878; *Papworth* v. *United States*, 256 F. 2d 125, 127–129 (C.A. 5), certiorari denied, 358 U.S. 854; *Carpenter* v. *United States*, 264 F. 2d 565, 571 (C.A. 4); *Tillman* v. *United States*, 268 F. 2d 422, 425 (C.A. 5); in each of these cases admissions to federal officers while the defendant

was held in state custody were held to have been properly admitted. "In the absence of any evidence of collaboration to achieve an unlawful end", there is no basis, as the court below ruled (R. 291), for excluding "uncoerced confessions made during a detention by state officers which the Federal officials did not induce and were powerless to prevent."

The common issue in both these cases (*i.e.*, the M. & F. and Liberty Bank cases) was one of fact, which the trial judges in the two cases, independently, and on the basis of a full development of the relevant evidence, resolved against petitioner (*supra*, pp. 28–30). Under settled principles, those findings must be accepted unless clearly erroneous. They were accepted, after full review, by the court of appeals. We have set forth our reasons for believing the findings to be fully supported by the evidence. The majority below were right, we submit, in concluding that "there is in this record no basis for the conclusion that the apprehension and continued detention of Coppola and his companions was at the behest of federal officers or for the purpose of aiding any investigation they wished to conduct" (R. 290). The dissenting judges' contrary conclusions were, as we have shown, based in large part on surmise and conjecture. Even to the extent that their views were based on the evidence and on inferences they felt compelled to draw, they had only the cold words of the record to appraise; they lacked the advantage, which the trial judges had, of seeing and hearing the witnesses. The concurrent findings of the two trial judges, confirmed by the court of appeals, must be sustained. Cf. *Abel* v. *United States*, 362 U.S. 217, 227–228, 240.

II

THE FACT THAT AT THE TIME WHEN PETITIONER VOLUNTARILY CONFESSED HE WAS BEING DETAINED BY LOCAL OFFICERS IN VIOLATION OF LOCAL LAW DID NOT IN ITSELF MAKE HIS CONFESSIONS OF FEDERAL OFFENSES TO FEDERAL OFFICERS INADMISSIBLE AT HIS TRIALS FOR THOSE FEDERAL OFFENSES

Petitioner also argues that the bare fact that when he confessed he was being detained by the city police in violation of New York arraignment law sufficed, without more, to render his confessions inadmissible at his federal trials (Br. 26–33). On this point, the argument is that it is immaterial whether his illegal detention was the result of connivance or collaboration between the federal and local officers, or of a "working agreement" between them of the sort involved in the *Anderson* case; the fact that when he confessed he was in illegal police custody is said to be enough in itself to require the exclusion of his confessions in a federal prosecution.

The same argument was made by the dissent below as an alternative basis for its rejection of the court's holding that the challenged confessions were properly received (R. 301–302). Pointing out that the *Anderson* decision, 318 U.S. 350, was "based upon" *McNabb* v. *United States*, 318 U.S. 332, and its determination "governed by the same considerations," the dissent stated (R. 302):

> In *McNabb* it was held that a confession secured in a two-day interval between arrest and arraignment could not be admitted in a federal criminal proceeding. The requirement of prompt arraignment is intended to protect a

> prisoner from intensive interrogation prior to the time a magistrate can determine whether there is any probable cause for detention and can inform the prisoner of his right to counsel and his right to remain silent. *Mallory* v. *United States*, 354 U.S. 449, 453–54 (1957). A federal defendant has been equally deprived of this protection whether his confession, exacted during detention prior to an arraignment, is made to a federal agent in a city, state or federal jail, or in a Tennessee Y.M.C.A.

The argument, we submit, is untenable.

A. In the first place, to adopt this rule would read out of the *Anderson* decision the very "working arrangement"—the "collaboration with state officers" by which the federal officers "secured improperly" the confessions there involved—upon which that decision turned. 318 U.S. at 356. It would have been wholly unnecessary for the Court to cite these factors if the bare fact that the defendants were being detained by the state officers in violation of state law at the time they made their confessions to the federal officers sufficed without more to require the exclusion of the confessions.

B. The argument also mistakes the holding and rationale of *McNabb* v. *United States*, 318 U.S. 332. The *McNabb* case established an exclusionary rule of evidence for federal criminal trials, the underlying purpose of which was to deter *federal law enforcement officers* from violating the federal prompt-arraignment statutes, now embodied in Rule 5(a) of the Federal Rules of Criminal Procedure. 318 U.S. at 340–347. It was the "use by the Govern-

ment of the fruits of wrongdoing by its officers" which the rule of that case was calculated to prevent. *United States* v. *Mitchell,* 322 U.S. 65, 70; *Upshaw* v. *United States,* 335 U.S. 410, 413.

Since it was wrongdoing by the government's own officers in violating Rule 5(a) that the *McNabb* rule was designed to discourage, it makes no difference (for the issue of admissibility in a federal court) whether, in the case of a confession of a federal offense made while in non-federal custody, the detaining officers have or have not complied with *local* law in effecting or maintaining the custody—*provided* that no federal officer is a party to any wrongdoing. In the *Anderson* case the confessions were inadmissible because federal officers were parties to the wrongdoing. In administering the so-called *McNabb* rule, the concern of the federal courts has been with the conduct of *federal* law enforcement officers with relation to the pertinent federal Rules on arrest and arraignment. Similarly, in another aspect of this Court's supervisory authority, the concern with unlawful searches and seizures reflected in *Rea* v. *United States,* 350 U.S. 214, and *Wilson* v. *Schnettler,* No. 182, decided February 27, 1961, has been directed at the activities of *federal* officers who alone are controlled by the federal Rules on obtaining evidence by search.

The fact is that the only officers the federal courts can effectively control are federal officers. If the unlawful detention is not initiated or furthered by federal agents, a rule excluding admissions or confessions given during such a period would not tend to further the ends sought by the prompt arraignment require-

ment of Rule 5(a) of the Federal Rules of Criminal Procedure—on which the *McNabb-Mallory* principle rests. State officers enforcing state law who detain a prisoner unlawfully would not be deterred from future violations merely because the confession of a federal crime which happened to be made during the detention would be excluded in the federal court. Rather, the effect of such a ruling would be to impede the federal prosecution without significantly furthering the policy of discouraging detentions by state officers which are illegal under state law.[40] To an important extent, such a rule would also give persons over whom the federal executive and the federal courts have no control the power to affect federal prosecutions through the timing of the state arraignment. State officers ought not to be given power so to interfere with federal prosecutions (cf. *Abbate* v. *United States*, 359 U.S. 187, 195), free of all control by the federal government.

Moreover, the mere fact that the confessions were made to federal officers—rather than to state officers or third parties—should not be held to be a sufficient federal "involvement". It is proper law enforcement practice for federal agents to interview potential defendants or witnesses who happen to be in the custody of another sovereignty—if the officials of the other sovereignty permit. This is a recognized method of investigation and law enforcement.[41] Certainly, these

[40] The *McNabb-Mallory* principle is not embodied in the Due Process Clause of the Fourteenth Amendment. See *infra*, p. 78.

[41] The F.B.I. agents testified at the hearings in both cases that they told petitioner that he did not have to talk or make

voluntary confessions to federal agents would have been admissible (at the federal trials) if made after the local arraignment. To hold them inadmissible because the interview took place during a period of unlawful detention by state officers would be either to charge the federal agents with an illegality in which they had no part or ineffectually to seek to enforce, via these agents, state rules on prompt arraignment with which federal courts and federal agents are not concerned (and are often not informed). And to hold such voluntary confessions admissible if made to state officials or private persons, but inadmissible if given to a federal agent, would seem quixotic, penalizing proper federal law enforcement without reason.

C. The argument that the federal courts somehow condone or ratify illegality when they admit a voluntary confession given during a period of illegal detention by state officers is likewise not well founded. The fundamental reason for a trial is the discovery of the truth. The rule of exclusion, however, does not bring out the truth; in its immediate impact on a particular case it suppresses truth. Hence, where the rule of exclusion is applied, it is not so much because to admit the evidence implies ratification or condonation, but because federal exclusion effectively serves to

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a statement, and that he had a right to an attorney, but that any statement he did make might be used against him. Petitioner denied this at the hearings, but in one of the two cases agent Eddy repeated this testimony before the jury, and it was not contradicted. See the Statement, *supra*, p. 23, and fns. 8 and 25, *supra*, pp. 7–8, 24–25.

keep federal law enforcement within proper bounds. The federal courts do not undertake to make certain that every bit of evidence that comes before them has been obtained with due observance of all the amenities by every person who might have relevant evidence. This was recognized by the Court in *Burdeau* v. *McDowell*, 256 U.S. 465. There, the petitioner's employer, after discharging him, stole documents from the petitioner's desk and safe and, after using them, turned them over to the government because they tended to show the commission of a federal offense. This Court held that the government need not surrender the documents to the petitioner, stating (*id.* at 476):

> The papers having come into the possession of the Government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the Government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character.

See, also, *McGuire* v. *United States*, 273 U.S. 95, 99: "The use by prosecuting officers of evidence illegally acquired by others does not necessarily violate the Constitution nor affect its admissibility."

Just as admission of the evidence in *Burdeau* did not mean exoneration or approbation of the employer's illegal acts, admission of the confessions in the present situation does not exonerate the state officers or imply approbation of their action in hold-

ing the petitioner too long before arraigning him on the local charges. Admission of evidence in a case involving illegal action by state officers merely means that the public interest in prosecution outweighs the benefit derived from application of an ineffective sanction. And just as the federal government need not take into account, or justify, the manner in which a private individual obtained evidence bearing on a crime, it ought not to have the burden of undertaking to justify the state detention during which the confession was made. See also *infra*, pp. 79 *ff*. The most that the federal courts can do is to make certain that federal officers conduct law enforcement activities within the limitations prescribed by the Constitution and by Congress. And arguments of ratification or condonation are relevant to that inquiry, if at all, only when federal officers are actually involved in the illegal activity. See also *Feldman* v. *United States*, 322 U.S. 487, 492.[42] The rule of exclusion has been applied only where a *federal* right has been violated, *i.e.*, where there has been a violation of the federal Constitution, a federal statute, or a federal Rule.

D. *Elkins* v. *United States*, 364 U.S. 206, upon which petitioner relies (Br. 28–33), is not opposed to these conclusions. That case held that "evidence obtained by state officers during a search which, if

[42] Mr. Justice Brandeis' famed dissent in *Olmstead* v. *United States*, 277 U.S. 438, rests in large measure on the proposition that the illegal action was taken by federal officers. *Id.* at 482. He stated, "The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress." *Id.* at 484. But see *Burdeau* v. *McDowell*, 256 U.S. 465, 476–477 (Justices Brandeis and Holmes dissenting).

conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial" (364 U.S. at 223). The decision overruled the so-called "silver platter" doctrine—that evidence so obtained was admissible in a federal court if its seizure had been "without involvement of federal officers" (p. 208).

The crux of the *Elkins* decision was that the victim of such a search and seizure, notwithstanding the nonparticipation by any federal officer and the absence of any federal responsibility for it, had nevertheless been deprived of a *federal* right of *constitutional* stature, *i.e.*, the right under the Fourteenth Amendment (as construed in *Wolf* v. *Colorado*, 338 U.S. 25) to be free from unreasonable searches and seizures by state officers. See, *e.g.*, 364 U.S. at 213, 214, 215, 221, 222, 223. Thus, the Court, after pointing out that the "underlying constitutional doctrine" of the *Wolf* decision was that "the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers," observed that that decision had removed the "doctrinal underpinning" of the silver platter rule. 364 U.S. at 213. Similarly, the Court observed—in discussing the "imperative of judicial integrity," the additional consideration on which the decision was based—that federal courts, if they were to receive such state-seized evidence, would become "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Id.*, pp. 222–223. And recently in *Monroe* v. *Pape*, No. 39, decided February 20, 1961, the Court declared (citing the *Wolf* and

Elkins decisions) that "the guarantee against unreasonable searches and seizures contained in the Fourth Amendment has been made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment" (slip op., p. 4).

It is apparent from these grounds of decision that the *Elkins* case is distinguishable from the present one in two decisive respects. First, we deal here with a claim which, unlike that involved in the *Elkins* opinion, has no constitutional aspect. The Constitution does not extend the *McNabb* rule to the states.[43] Apart from the claimed collaborative involvement of federal officers (which our present discussion pretermits), the petitioner's claim has no federal aspect at all. That claim is that the arraignment of petitioner by state officials in a state court for state offenses was not as prompt as required by a locally applicable state statute. Neither of the two trial judges found any basis for concluding that petitioner's confessions were coerced, or *constitutionally* invalid. See *supra*, pp. 7–8, 24–25, fns. 8 and 25. No such constitutional claim, moreover, was even advanced in the court of appeals, and none is made here. The absence from this case of any claim of violation of a federal constitutional right thus makes inapplicable the rule

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[43] See *Crooker* v. *California*, 357 U.S. 433, 439; *Cicenia* v. *Lagay*, 357 U.S. 504, 509; *Fikes* v. *Alabama*, 352 U.S. 191, 199 (concurring opinion); *Rea* v. *United States*, 350 U.S. 214, 216–217; *Burns* v. *Wilson*, 346 U.S. 137, 145 (opinion of Vinson, C.J.); *Stein* v. *New York*, 346 U.S. 156, 187–188; *Brown* v. *Allen*, 344 U.S. 443, 476; *Stroble* v. *California*, 343 U.S. 181, 197; *Gallegos* v. *Nebraska*, 342 U.S. 55, 63–65 (opinion of Reed, J.); *Lyons* v. *Oklahoma*, 322 U.S. 596, 597–598, n. 2; *Lisenba* v. *California*, 314 U.S. 219.

and rationale of *Elkins* v. *United States*, where the fac that a right of that stature had been violated was the controlling consideration. In this cardinal respect the instant case is comparable, not to *Elkins*, but to *Weeks* v. *United States*, 232 U.S. 383, 398, and *Byars* v. *United States*, 273 U.S. 28, laying down the former rule that evidence unreasonably seized by state officers (without federal participation) was admissible in a federal trial because, prior to the *Wolf* case, such a search-and-seizure was thought not to violate the federal Constitution. 364. U.S. at 210–213.

Secondly, the evidence involved in the *Elkins* case was seized by the state officers—*the officers who allegedly violated the law.* Here, the challenged evidence—the federal confessions—was obtained, not by the state officers, whose detention of petitioner without prompt arraignment constituted the illegal act, but by the federal officers, who (it is assumed in this Point) were innocent of any wrongdoing. There are some considerations of propriety arguing against the admission of evidence the very act of procuring which violated rights of the accused. But such considerations have no place in a case such as this, where the officers who secured the contested evidence were innocent of wrongdoing, and the only taint which can arguably be said to infect it lies in the culpable acts of others.

E. Finally, the rule urged by petitioner would make the admissibility, in a federal court, of a voluntary confession of a federal offense, made to a federal officer, depend, if given while in the custody of state officers, upon the widely variant arraignment laws of the several states. A provision frequently

found in the state statutes requires (like federal Rule 5(a) and the New York statute) that the person arrested be arraigned before a magistrate "without unnecessary delay."[44] The question would arise as to what is meant by "unnecessary delay" in that jurisdiction; it would be imperative to consult local decisions to determine whether the type of delay evidenced by the record was necessary or unnecessary within the statute. The statutory provisions themselves, moreover, vary widely from state to state, and would inevitably pose difficult questions of interpretation. For example, under the rule proposed by petitioner and the minority below, a confession of a federal crime to a federal officer while in local custody where arraignment had been delayed might, depending upon the length of the delay, be inadmissible if made in a state which, like California, imposes a specific maximum time limit within which arraignment must be had,[45] but admissible if made in a state

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[44] E.g., Ariz. Stats. 1956, §§ 13–1417, 13–1418, 13–1419; Fla. Stats. 1941, §§ 901.06, 901.23; Ida. Code 1947, §§ 19–515, 19–614, 19–615; Ill. Smith-Hurd Ann. Stats., c. 38, § 660; Iowa Code 1946, §§ 755.14, 758.1; La. Rev. Stats. 1950, § 15:79; Mich. Stats. Ann., §§ 28.872, 28.873, 28.885; Miss. Code 1942, § 2473; Mont. Rev. Codes 1947, § 94–5912; Nev. Rev. Stats., §§ 171.290, 171.300; N.D. Century Code, §§ 29–06–23, 29–06–25; Ohio Rev. Code 1953, §§ 2935.05, 2935.06; Okla. Stats. Ann., Tit. 22, § 181; S.D. Code 1939, §§ 34.1608, 34.1619; Utah Ann. Code 1953, §§ 77–13–15, 77–13–17.

[45] California requires arraignment "without unnecessary delay, and, in any event, within two days after [the person's] arrest, excluding Sundays and holidays". Penal Code, § 825. Cf. Del. Code 1953, Tit. 11, § 1911; N.H. Rev. Stats. 1955, § 594:23; R.I. Gen. Laws 1956, § 12–7–13.

where no specific limit is prescribed. Missouri, by implication at least, authorizes the detention of persons arrested without warrant for up to twenty hours without arraignment,[46] and New Hampshire makes the duration of lawful detention without arraignment depend, at least in part, upon the time of day when the arrest is made.[47] The admissibility of the federal confession to a federal officer, while in the custody of one of these states, would depend, under the rule urged by petitioner, upon these and similar peculiarities in the local law of arraignment. If the confession were made in a state which, like Arkansas,[48] requires the "forthwith" arraignment of arrested persons, there would be the problem of whether a slight delay by the arresting officers, and one which by federal standards was reasonable, would require the rejection of the confession by the federal court.

Moreover, if, as would frequently happen (compare this case [49]), the legality of the initial detention

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[46] Rev. Stats. 1949, § 544.170. The section requires that persons arrested without warrant be discharged within twenty hours unless within that time they are charged with crime by the oath of a credible person.

[47] Rev. Stats. 1955, §§ 594:19, 594:20. Section 594:19 requires that arraignment, in general, be effected "without unreasonable delay." Section 594:20 provides that, if the arrest be between sunset and sunrise, arraignment may be deferred for "not exceeding twenty-four hours."

[48] Stats. 1947, § 43-601. See, also N.J. Stats. Ann. (Perm. Ed.), § 2A:18-10; Vt. Stats. 1958, Tit. 13, § 5507; cf. Tex. Code Crim. Proc., Art. 217 ("immediately").

[49] See fn. 30, *supra*, p. 44.

itself were challenged, the federal court might well be required to inquire into the difficult area of the law of arrest as developed in the statutory and decisional law of the particular state—though the federal officers (to whom the confession was made) had, by present hypothesis, nothing whatever to do with the prisoner's apprehension. If the arrest were pursuant to warrant, typical questions would be whether the warrant was properly issued, on proper grounds, by an authorized official, and whether it was properly executed by a qualified officer. If there were no warrant, decision would be required as to whether the locally applicable conditions of a valid arrest without warrant were met.[50]

The suggested rule would make what is essentially a federal question—and one in respect of which uniformity of decision throughout the country is

[50] By statute in some states (to cite but one instance of the significant variance of the law of arrest from state to state) a peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed, or is about to commit a crime, and demand of him his name, address, and business abroad; if the person fails to identify himself or explain his actions to the satisfaction of the officer, the officer may further detain, question, and investigate him for a period not to exceed two hours (four hours in New Hampshire) without the necessity of charging him with any crime; at the end of this period of detention the detained individual must either be released or "be arrested" and charged with a crime; such detention (the statutes further provide) is not to be deemed an arrest, or to be recorded as such in any official record. See Del. Code 1953, Tit. 11, § 1902; N.H. Rev. Stats. 1955, § 594:2; R.I. Gen. Laws 1956, § 12-7-1. The provisions are part of the proposed Uniform Arrest Act (section 2), reprinted in Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 343-347 (1942).

much to be desired—depend upon the status of the law of arrest and arraignment in the particular state where the accused happened to be in custody. The decision in each case would require examination into a complex area of local law, decisional and statutory, by a court having neither familiarity with, nor special competence in, the details of that law and the local precedents. A federal officer, who learns that a person whom he wishes to question in connection with an investigation in which he is engaged is in the custody of state or local officers, should not be required to determine at his peril whether the custody of the person was legally effected and is being legally maintained. To make inquiry into such matters—to check, in effect, on whether the local officials know their business and have lawfully carried it out—might well be considered presumptuous and offensive. In any event, to require the federal agent to determine whether the detention is unlawful would impose upon him, initially, the task of assessing the various state statutory and judicial rules on arrest and arraignment—at the risk of having a statement declared inadmissible at the federal trial.[51]

[51] In this case, it should be noted, there is no question of the admissibility of a confession made by a defendant in illegal custody to a federal officer who affirmatively *knows* the prisoner's detention to be illegal under local law, and takes advantage of that fact. There was no evidence that any federal agent or officer knew that petitioner's detention was illegal at the time of the confessions, nor that any federal agent or officer attempted to make use of the unlawful detention for federal purposes. See *supra*, pp. 51-69.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgments of the court of appeals should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 153.—October Term, 1960.

Frank R. Coppola, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April 17, 1961.]

Per Curiam.

We brought this case here, 364 U. S. 813, believing that it presented a question under *Anderson* v. *United States*, 318 U. S. 350. After hearing oral argument and fully examining the transcript of the proceedings in the trial court, we conclude that the particular facts of the case are not ruled by *Anderson*. We find no merit in the other argument advanced by the petitioner.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 153.—October Term, 1960.

Frank R. Coppola, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April 17, 1961.]

Mr. Justice Douglas, dissenting.

Petitioner has been convicted of participating in two different bank robberies in violation of 18 U. S. C. § 2113. In each case petitioner's confessions obtained by agents of the F. B. I. were admitted against him. These confessions were made during an interrogation taking place in the Buffalo police headquarters while petitioner was under detention by local police.

Petitioner was no stranger to the F. B. I. One of the bank robberies charged against petitioner occurred in February 1956, the other in October of that year. The F. B. I. had first come into contact with petitioner when, at their request, he re-enacted the events of the first robbery before an audience of its victims. Apparently nothing came of this investigation. Then—almost a year later—the F. B. I. came into possession of information that petitioner was involved in an unrelated state crime. This information was relayed to the Buffalo police and put into motion the events which led to petitioner's detention, his interrogation, and his being charged with these federal crimes. He was arrested by the local police on a charge of violation of the state law at about 9:30 in the morning. The Buffalo police, who had arrested him, had interrogated him during the day. But they made no

attempt to have a prompt commitment hearing that was required by New York law.[1]

The F. B. I. had been informed of petitioner's arrest about noon of the day of his arrest. At nine in the evening of that day they received permission to interrogate petitioner as to his involvement in the two robberies. From nine in the evening until almost one o'clock in the morning of the next day, they carried on their interrogation, while state officials left them alone with petitioner "as a matter of courtesy." It was during this period that petitioner confessed to participation in both crimes. The next day, the federal officers officially "requested custody" of petitioner, so that he could be arraigned on the federal charges. There was some delay before he was given into federal "custody," for the local police had to see to his commitment under the state charges. Shortly after two o'clock in the afternoon he was arraigned on the state charges in the Buffalo City Court. At four in the afternoon, about 19 hours after the federal agents had commenced their interrogation, petitioner was arraigned in the federal court. There has been much attention focused, in the progress of this case, on whether the Buffalo police and the F. B. I. had a "working arrangement" (see *Anderson* v. *United States*, 318 U. S. 350, 356) by which petitioner's detention was effected. In my view, the activity of the federal agents in this case is proscribed without regard to whether there was, or was not, a pre-existing "working arrangement."

The confessions would be inadmissible in the case now before us if the original arrest in this case had been made by federal officers. For the duty of a federal officer making an arrest is to take the arrested person "without

[1] N. Y. Code Crim. Proc. § 165. See *People* v. *Lovello*, 1 N. Y. 2d 436, 438, on whose authority the Government concedes the illegality of the detention under state law.

unnecessary delay" before a judicial officer for a hearing in compliance with Rule 5 (a), Fed. Rules Crim. Proc. Here the petitioner was detained for 20 hours without seeing a judicial officer of any sort; and for 19 of these hours he was under the visitation of federal officers. There was no effort to arraign the accused during that time. The federal officers took no steps to do it themselves; nor did they insist that the state police make the arraignment before a state judge as required by state law. There was also no showing that magistrates were unavailable.[1] I think it plain therefore that the 19-hour detention was an "unnecessary delay" within the meaning of Rule 5 (a).

Arrest, and the resulting detention, serves, under the Federal Rules, the purpose of assuring that a person accused on probable grounds of a crime will be amenable to the orders of a competent court, which include by the terms of Rule 5 (b) the right to counsel and to bail. It is not an administrative step preliminary to a secret interrogation. In *Mallory v. United States*, 354 U. S. 449, 454, this Court said that an accused "is not to be taken to police headquarters in order to carry out a process of inquiry, ..." In that case the accused was arrested at 2:30 p. m. and his questioning began about 8 p. m. By 10 p. m. he confessed at which time the federal agents tried, without success, to reach a federal magistrate. Between 11:30 p. m. and midnight, petitioner dictated his confession to a typist; and he was not arraigned until the next morning.

The only reason put forward for a different result in this case is that the "police headquarters" in which fed-

[1] There is some suggestion that a state magistrate was not available after five o'clock in the afternoon. Cf. N. Y. Code Crim. Proc. § 165. But there is no suggestion that a federal magistrate was not available.

eral agents carried out the wrongful "process of inquiry" belonged to Buffalo police rather than the Federal Government. The Government contends here, as it did in *Anderson* v. *United States*, *supra*, 356, that it is not "formally guilty of illegal conduct." The device is too transparent. I do not think that federal agents can avoid the impact of federal rules by taking advantage of an illegal detention arranged by state officers. Rule 5 (a) is not a formality; its purpose is to minimize secret police interrogation of persons under detention; its ultimate aim is to avoid those situations out of which grow the whole system of the "third degree." The evil at which the rule aims is in interrogation in secret and in detention before the arraignment. Its means are arraignment "without unnecessary delay." Here, the federal agents carried on the kind of interrogation against which Rule 5 (a) is aimed. The fact that the interrogation took place in the cell of a state police station rather than in the cell of a federal jail or prison only accentuates the evasion of the Rule. In this case the federal agents used an illegal detention as the occasion to carry on a secret interrogation. What the federal agents cannot do in federal precincts they cannot do in a state jail. What we do today is to permit federal agents to flout the federal law so long as they let the accused stay in a state jail and interrogate him there to their hearts' content.